95-422

No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

EDWIN R. O'NEILL, FRANCIS A. ORFF,
Y. STEPHEN PILIBOS,
Petitioners,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by this petition for writ of certiorari is: Where (a) farmers possessed water rights to buy from the government and use 900,000 acre feet of irrigation water each year under federal reclamation statutes and contracts, state water right permits, and a federal court judgment; (b) the government refused to sell or deliver 450,000 acre feet of that water, but instead, reallocated it for fishing, hunting, and environmental purposes, claiming that subsequent statutes mandated that it do so; and (c) the farmers instituted post-judgment proceedings to enforce their right to buy and use the reallocated water, may a federal court (1) abstain from deciding the statutory elements of the government's affirmative defense on the ground that such elements should be decided in a subsequent suit, which effectively deprived the farmers of their water, without denying procedural due process and abusing its discretion, and yet (2) decide the substantive due process elements of that same defense, which it would not have reached had it ruled for the farmers on the statutory elements, without violating this Court's basic prohibitions against rendering advisory opinions or deciding unripe issues.

RULE 29.1 LIST

None of petitioners Edward R. O'Neill, Francis A. Orff, or Y. Stephen Pilibos has a parent company or a nonwholly owned subsidiary.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. The Reclamation Program	2
B. Water Rights Under Reclamation Statutes	3
C. Water Rights Under State Law	4
D. The Contracts	5
E. The Judgment	6
F. Subsequent Statutes	7
G. Prelitigation Proceedings	8
H. Motion To Enforce Judgment	9
I. Motion For Findings And Conclusions	12
J. Appellate Proceedings	13
K. The Subsequent Action	14
REASONS FOR GRANTING THE WRIT	16
I. ABSTENTION ON THE STATUTORY ELEMENTS OF THE GOVERNMENT'S DEFENSE RESULTING IN A LOSS OF WATER RIGHTS WITHOUT A HEARING CONFLICTS WITH THIS COURT'S DECISIONS ON PROCEDURAL DUE PROCESS	16

TABLE OF CONTENTS—Continued

Page

II. DECISION OF THE CONSTITUTIONAL ELEMENTS OF THE GOVERNMENT'S DEFENSE AFTER ABSTENTION ON THE STATUTORY ELEMENTS CONFLICTS WITH THIS COURT'S DECISIONS ON RIPENESS AND ADVISORY OPINIONS 19

III. ABSTENTION ON THE STATUTORY ELEMENTS OF THE GOVERNMENT'S DEFENSE IN CONJUNCTION WITH DECISION OF THE CONSTITUTIONAL ELEMENTS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REQUIRING CAREFUL STATUTORY SCRUTINY 22

IV. ABSTENTION ON THE STATUTORY ELEMENTS OF THE GOVERNMENT'S DEFENSE AFTER THEY HAD BEEN TRIED CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON WHICH OF TWO CASES YIELDS TO THE OTHER 26

CONCLUSION 29

TABLE OF AUTHORITIES

Cases Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 20
Adam v. Jacobs, 950 F.2d 89 (2d Cir. 1991) 28
Armstrong v. Manzo, 380 U.S. 545 (1965) 18
Barcellos and Wolfsen, Inc. v. Westlands Water Dist., 491 F. Supp. 263 (E.D. Cal. 1980) 6
Barcellos and Wolfsen, Inc. v. Westlands Water Dist., 849 F. Supp. 717 (E.D. Cal. 1993) 2
Bell v. Burson, 402 U.S. 535 (1971) 19
Bowen v. Public Agencies Opposed To Social Sec. Entrapment, 477 U.S. 41 (1986) 10
Bowen v. U.S., 422 U.S. 916 (1975) 21
Califano v. Yamasaki, 442 U.S. 682 (1979) 21
California Trout, Inc. v. State Water Resources Control Bd., 207 Cal. App. 3d 585 (1989) 4
California v. U.S., 438 U.S. 645 (1978) 2
City of New York v. Exxon Corp., 932 F.2d 1020 (2d Cir. 1991) 28
Cohens v. Virginia, 19 U.S. 264 (1821) 16
Colorado River Water Conservation Dist. v. U.S., 424 U.S. 800 (1976) 16, 22, 27
Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961) 20
Dugan v. Rank, 372 U.S. 609 (1963) 3
Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983) 21
Emrick v. Bethlehem Steel Corp., 624 F.2d 450 (3d Cir. 1980) 29
Farmers & Merchant's Bank v. Federal Reserve Bank, 262 U.S. 649 (1923) 3
First City National Bank & Trust Co. v. Simmons, 878 F.2d 76 (2d Cir. 1989) 28
Gasoline Prod. Co. v. Champlin Ref. Co., 283 U.S. 494 (1931) 26
Hodges v. Snyder, 261 U.S. 600 (1923) 11
Holguin v. Elephant Butte Irrigation Dist., 91 N.M. 398, 575 P.2d 88 (1977) 5
Hughes Communications Galaxy, Inc. v. U.S., 998 F.2d 953 (Fed. Cir. 1993) 11

TABLE OF AUTHORITIES—Continued

	Page
Ickes v. Fox, 300 U.S. 82 (1937)	4
Ivanhoe Irrigation Dist. v. All Parties, 47 Cal. 2d 597 (1957), *rev'd on other grounds, Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958)	4
Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275 (1958)	3, 25
James v. City of St. Petersburg, 6 F.3d 1457 (11th Cir. 1993)	18
Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180 (1952)	17, 22, 26
Landis v. North American Co., 299 U.S. 248 (1936)	16, 18
Libby Rod & Gun Club v. Poteat, 457 F. Supp. 1177 (D. Mont. 1978)	29
Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration, 113 U.S. 33 (1885)	20
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	18, 19
Lynch v. U.S., 292 U.S. 571 (1934)	3, 11, 24
Madera Irrigation Dist. v. All Persons, 47 Cal. 2d 681 (1957)	4
Martini v. Republic Steel Corp., 532 F.2d 1079 (6th Cir. 1976), *cert. denied*, 429 U.S. 927 (1976)	29
Mathews v. Eldridge, 424 U.S. 319 (1976)	19
Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978)	18, 19
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	10
Missouri v. Jenkins, 495 U.S. 33 (1990)	18
Nebraska v. Wyoming, 325 U.S. 589 (1944)	4
Nevada v. U.S., 463 U.S. 110 (1983)	2, 4, 7
New Orleans Public Serv. v. Council of New Orleans, 491 U.S. 350 (1989)	16
O'Neill v. U.S., 50 F.3d 677 (9th Cir. 1995)	1
Perry v. U.S., 294 U.S. 330 (1935)	11, 23
Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941)	20

TABLE OF AUTHORITIES—Continued

	Page
Resolution Trust Corp. v. Federal Sav. and Loan Ins. Corp., 25 F.3d 1493 (10th Cir. 1994)	11, 24, 25
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	20
Saunders v. Shaw, 244 U.S. 317 (1917)	18
Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970)	28
Sierra Club v. Block, 614 F. Supp. 488 (D.D.C. 1985)	30
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)	20
U.S. Trust Co. v. New Jersey, 431 U.S. 1 (1977)	3, 23
U.S. v. Fruehauf, 365 U.S. 146 (1961)	20
U.S. v. Gerlach Live Stock Co., 339 U.S. 725 (1950)	3
U.S. v. Klein, 80 U.S. 128 (1871)	11
U.S. v. Raines, 362 U.S. 17 (1960)	20
U.S. v. State Water Resources Control Bd., 182 Cal. App. 3d 82 (1986)	5
Westlands Water Dist. v. NRDC, 43 F.3d 457 (9th Cir. 1994)	15
Westlands Water Dist. v. U.S. Dep't of Interior, 850 F. Supp. 1388 (E.D. Cal. 1994)	15
Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909)	16
Winstar Corp. v. U.S., —— F.3d ——, 1995 WL 509409 (Fed. Cir. Aug. 30, 1995)	11, 24

Statutes

16 United States Code	
§ 1532(16)	7
§ 1533	7
§ 1536(a)(2)	7
§ 1540(g)(1)(A)	30
§ 1540(g)(2)(A)(i)	8
§ 1540(g)(5)	29
28 United States Code	
§ 1254(1)	2

TABLE OF AUTHORITIES—Continued

	Page
43 United States Code	
§ 372	4
§ 383	5
§ 423e	3
§ 485h(d)	3
§ 485h(e)	3
§ 485h-1(4)	4
§ 485h-4	4
California Water Code	
§ 1375(d)	4
§ 1381	4
§ 1455	4
Central Valley Project Act, 50 Stat. 844 at 850 (Aug. 26, 1937)	2, 4
Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4706 (Oct. 30, 1992)	7, 8, 25
Central Valley Project Reauthorization Act, Pub. L. 674, 68 Stat. 879 (Aug. 27, 1954)	2
Endangered Species Act	7
San Luis Unit Authorizing Act, Pub. L. 86-488, 74 Stat. 156 (June 3, 1960)	3, 4
Federal Rules	
Federal Rules of Civil Procedure	
Rule 24	14
Rule 42(b)	26
Regulations	
50 Code of Federal Regulations	
§ 17.11	8
§ 227.4	7
Law Review Articles	
Brian E. Gray, "The Modern Era In California Water Law," 45 *Hast. L.J.* 249 (1994)	8

TABLE OF AUTHORITIES—Continued

Miscellaneous Page

128 Cong. Rec. S17659-60 (daily ed. Oct. 8, 1992).. 25

Robert E. Beck, ed., *Waters And Water Rights* (1991) 8

U.S. Constitution

U.S. Constitution, Amendment V 2

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PETITION FOR WRIT OF CERTIORARI

Petitioners Edwin R. O'Neill, Francis A. Orff, and Y. Stephen Pilibos pray that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Court of Appeals, reproduced as Appendix A, is reported *sub nom. O'Neill v. U.S.*, 50 F.3d 677 (9th Cir. 1995). Its order denying a petition for rehearing, and rejecting a suggestion for rehearing *en banc*, is reproduced as Appendix C. The two rulings of the U.S. District Court for the Eastern District of California, reproduced as Appendix B, are reported *sub*

nom. Barcellos and Wolfsen, Inc. v. Westlands Water Dist., 849 F. Supp. 717 (E.D. Cal. 1993).

JURISDICTION

The Court of Appeals decision was filed and judgment entered on March 14, 1995. Its subsequent order was filed on June 8, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part, as follows: "No person shall . . . be deprived of . . . property without due process of law."

STATEMENT OF THE CASE

A. The Reclamation Program

The Bureau of Reclamation of the U.S. Department of the Interior constructs and operates water projects in the 17 western states and sells and delivers irrigation water to farmers.[1] The reclamation program was originally enacted in 1902 and statutes governing its operation throughout the west have been repeatedly amended by Congress. The quantity of water sold and delivered by the Bureau and bought and used by farmers in a service area is governed by a construct of those statutes, state water rights, federal reclamation contracts, and judicial decrees.

The Central Valley Project in California was authorized in 1937 and reauthorized in 1954. 50 Stat. 844 at 850 (Aug. 26, 1937); Pub. L. 674, 68 Stat. 879 (Aug. 27, 1954) The CVP's key feature is Shasta Dam at the northern reaches of the Sacramento River. Water collected behind it is released by the Bureau, flows southward to the Sacramento-San Joaquin Delta, and is diverted by opening the gates of the Delta cross channel

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[1] See *Nevada v. U.S.*, 463 U.S. 110, 115, 128 (1983); *California v. U.S.*, 438 U.S. 645, 649, 650, 663 (1978).

located in the north of the Delta and distributed from the Delta to various CVP units.[2]

The CVP's San Luis Unit, located on the west side of the San Joaquin Valley, south of the Delta, was authorized by Congress in 1960. Pub. L. 86-488, 74 Stat. 156 (June 3, 1960). Area I, where petitioners farm, consists of about 400,000 acres of prime land and represents the majority of the service area of the Unit. Water for the Unit flows to the Tracy Pumping Plant located in the south of the Delta, is pumped south through the San Luis Canal, is stored in the San Luis Reservoir, and then resumes its flow through the Canal and the Area I distribution system to farmers' lands.

B. Water Rights Under Reclamation Statutes

Area I farmers are beneficiaries of a 1963 water service contract pursuant to which they bear their share of the costs of constructing and operating major project facilities. 43 U.S.C. § 485h(e). They are also beneficiaries of a 1965 repayment contract pursuant to which they repay costs of the internal distribution system. *Id.* at § 485h(d). Recordable contracts were made by the United States and Area I landowners or their predecessors in the late 1960s relating to the sale of land in excess of acreage limits. *Id.* at § 423e. All these contracts contained preambles and recitals stating they were made pursuant to federal reclamation statutes.[3]

Under reclamation statutes beneficial use is the basis, measure and limit of the right to the use of water. *Id.*

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[2] See *U.S. v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-30 (1950); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 279-87 (1958); *Dugan v. Rank*, 372 U.S. 609, 611-14 (1963).

[3] The terms of a government contract include the authorizing statutes in effect at the time it was made. *Lynch v. U.S.*, 292 U.S. 571, 577 (1934); *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.17 (1977); *Farmers & Merchants' Bank v. Federal Reserve Bank*, 262 U.S. 649, 660 (1923).

at §§ 372, 485h-4, 485h-1(4). The usufructuary right is acquired by prior appropriation. *Ickes v. Fox*, 300 U.S. 82, 95 (1937). The appropriation is perfected by application of the water to the land. *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1944). The water right is the property of individual landowners. *Ickes*, 300 U.S. at 95; *Nebraska*, 325 U.S. at 615-16. It is appurtenant to the land irrigated. 43 U.S.C. §§ 372, 485h-4, 485h-1(4). The right is part and parcel of the land upon which water has been applied. *Ickes*, 300 U.S. at 95-96.

C. Water Rights Under State Law

The 1963 service contract also recites that the original Westlands Water District, which embraced Area I, desired to contract pursuant to the laws of California for the furnishing of a water supply from the CVP.

The Bureau was authorized to acquire the state water rights necessary for the CVP for the purpose of reclaiming arid lands. 50 Stat. at 850 § 2. The Unit was not to be commenced until the Bureau had secured all rights to the use of water which were necessary to carry out its purpose. Pub. L. 86-488 § 1(a).

To obtain a permit under California law, there must be unappropriated water available to supply beneficial users. California Water Code § 1375(d). A permit carries the right to take and use the water. *Id.* at §§ 1381, 1455. The basis, measure, and limit of the appropriative right is the actual beneficial use of the water. *Madera Irrigation Dist. v. All Persons*, 47 Cal. 2d 681, 690 (1957). To perfect a water right for agricultural purposes the water must be used by actual application on the land. *California Trout, Inc. v. State Water Resources Control Bd.*, 207 Cal. App. 3d 585, 610 (1989); *Nevada*, 463 U.S. at 126. Landowners served with federal reclamation project water hold the water right. *Ivanhoe Irrigation Dist. v. All Parties*, 47 Cal. 2d 597, 627-29 (1957), *rev'd on other grounds, Ivanhoe*, 357 U.S. 275

(1958). Such rights are vested and cannot be infringed. *U.S. v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 101 (1986).

State permits were issued in 1961 to supply water to the Unit. They provide that the rights thereunder are held in trust for the water users who by use of the water on the land became the true owners of the perpetual right to continue such use. The Bureau serves as a trustee for the landowners. *Holguin v. Elephant Butte Irrigation Dist.*, 91 N.M. 398, 401, 575 P.2d 88 (1977).

Federal reclamation statutes shall not affect nor interfere with state laws relating to the appropriation, use, or distribution of irrigation water or any vested right thereunder. 43 U.S.C. § 383. Interior shall carry out the reclamation program in conformity with state law. *Id.*

D. The Contracts

The 1963 service contract recites that investigations had indicated that a water supply to meet Area I's present and projected needs can be made available through Unit facilities, and that there will be available for furnishing to Area I from the Unit such a supply.

Article 3(d) of the 1963 contract provides that each year the United States shall furnish to the original District for use on eligible lands, and it shall accept and pay for, 900,000 acre feet of water, Area I's full supply. The 1965 repayment contract recites that the United States will furnish CVP water to the original District pursuant to the 1963 service contract.

Recordable contracts were expressly made in consideration of the direct and indirect benefits to be derived under the terms of the 1963 contract, as implemented thereby, and as an inducement to the United States to make water available for excess lands.

Upon execution of recordable contracts, the Bureau sold and delivered to Area I landowners a full water

supply which they applied to their land for irrigation purposes. Upon such application, water rights under federal and state law were perfected.

Article 3(f) of the 1963 service contract provides that the right to the beneficial use of water furnished pursuant to the terms thereof shall not be disturbed so long as all obligations thereunder shall be fulfilled.

During the past 25 years Area I landowners and water users have fulfilled all their obligations. They have paid service charges under the 1963 contract and made repayments under the 1965 contract approximating a half billion dollars. All their excess lands have been sold.

Article 11 of the 1963 contract provides that there may occur at times during any year a shortage in the quantity of project water available for furnishing to Area I, but in no event shall liability accrue against the United States for any damage arising on account of errors in operation, drought, or any "other causes."

E. The Judgment

Until 1978, the Bureau performed its obligations. Except for one year of drought, 900,000 acre feet of water were delivered annually to Area I water users. However, in 1978, the government refused to perform the contract, maintaining that it was invalid under two rules of reclamation law. First, Interior argued that the eastern portion of Area I was outside the authorized Unit service area. Second, it argued that the service charges in the 1963 contract and repayments required by the 1965 contract were insufficient to recover the escalated project costs. Accordingly, Interior claimed, reclamation statutes prohibited delivery of water to any Area I lands. See *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 491 F. Supp. 263 (E.D. Cal. 1980). From 1978 until 1986, while such litigation was pending, the government required the District to enter into one-year contracts

which permitted the government to reallocate water from Area I for environmental reasons.

In 1986, the parties stipulated to, and the District Court entered, a judgment ordering the United States to perform the 1963 contract. The judgment also declared that the government's two purported defenses under reclamation statutes were invalid. The judgment appoints each of the petitioners as an Area I representative. Such representatives were authorized to represent Area I for purposes of enforcement of the judgment. It provides that a party may obtain relief from a violation thereof by the filing of a motion in that litigation after 60 days' prior written notice seeking an order directing the government to perform the judgment.[4] After its entry, full water deliveries resumed, except in drought years.

F. Subsequent Statutes

The Endangered Species Act was enacted in 1973. 16 U.S.C. § 1531 *et seq.* Section 7(a)(2) of ESA provides that each federal agency shall insure that any action authorized by it is not likely to jeopardize the continued existence of any threatened species. *Id.* at § 1536(a)(2). In 1990 the distinct Sacramento River winter run population segment of the chinook salmon species was listed by the Department of Commerce as threatened. *Id.* at §§ 1532(16), 1533; 50 C.F.R. § 227.4. On February 12, 1993, Commerce issued a biological opinion finding jeopardy and suggesting alternative operations, including closure of the Delta cross channel gates and reduced pumping at the Tracy Pumping Plant during key times of the irrigation season.

In October 1992 Congress enacted the CVP Improvement Act. Pub. L. 102-575, 106 Stat. 4706 *et seq.* Sec-

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[4] Such judgments bar future attempts to reallocate irrigation water to other purposes. *Nevada*, 463 U.S. at 131. The policies advanced by preclusion doctrines are perhaps at their zenith in water cases. *Id.* at 129 n.10.

tion 3406(d) of the CVPIA requires that Interior shall provide firm water supplies to maintain and improve wetland habitat areas.

Section 3406(b)(2) of the CVPIA directs Interior to dedicate and manage annually 800,000 acre feet of CVP yield for the primary purpose of implementing the fish and habitat restoration purposes and measures of the CVPIA and to assist California in its efforts to protect the waters of the Delta. Interior listed the Delta smelt as threatened on March 5, 1993. 50 C.F.R. § 17.11. On May 26, 1993 it proposed taking action under § 3406(b)(2) to protect smelt habitat.

G. Prelitigation Proceedings

During the latter part of water year 1992-1993 (which was to end on February 28, 1993) petitioners became aware that the government was considering effecting, during the next year, one or more involuntary reallocations of Area I's water supply for salmon, smelt, or wetland habitat uses.[5]

On November 18, 1992 petitioners sent to the United States a notice demanding that Area I's water rights be honored during the 1993-1994 water year (which was to start on March 1, 1993) and that the government so confirm within 60 days.[6] The government made no substantive response.

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[5] Involuntary realocations under CVPIA and ESA pose the most dramatic challenges to the existing allocation scheme. Brian E. Gray, "The Modern Era In California Water Law," 45 *Hast. L.J.* 249, 252, 260-61, 306 (1994). To date the government has chosen to exercise any authority to effect them sparingly. *Id.* at 307. Involuntary reallocation is legally difficult. Robert E. Beck, ed., *Waters And Water Rights* (1991) § 16.03(a) at 331 n.464. Before now, there was little enthusiasm for the idea. *Id.* at § 16.04(a) at 370.

[6] On January 29, 1993 the District filed a prelitigation notice under ESA. 16 U.S.C. § 1540(g)(2)(A)(i).

On April 7, 1993 the Bureau publicly announced its final determination that Unit contractors would be allowed to buy only 50% of their water entitlement for water year 1993-1994, a year of heavy rainfall, saying that alternative operations would meet CVPIA and ESA requirements. CVP contractors outside the Unit, however, were allocated 100% of their water. The government did not further disclose the reasons for refusing to sell and deliver half of Area I's water entitlement.

H. Motion To Enforce Judgment

On March 26, 1993, petitioners moved for an order enforcing the 1986 stipulated judgment and directing the United States, Interior, and the Bureau to honor Area I's water rights. They sought equitable relief prohibiting the government from reallocating the water in question and mandating that the water be sold and delivered to Area I farmers during the 1993-1994 water year.[7]

In opposition the government conceded that the United States had agreed to make available to Area I farmers 900,000 acre feet of CVP water from the Unit annually and that they had a right to receive such water. But it raised an affirmative defense relating to one reallocation for salmon uses and another for wetland habitat uses. (The government offered no defense relating to the third reallocation, but anticipated that one would arise in the future for smelt uses.)

The government claimed that approximately 225,000 acre feet had been reallocated for salmon uses. It submitted a declaration of a Bureau operations official noting that the biological opinion included operating alternatives, including the closure of the Delta cross channel gates, and the limitation of export pumping at the Tracy Pump-

[7] Alternatively, they sought monetary relief in the sum of $16,000,000, the estimated added cost to procure substitute water during that year's irrigation season.

ing Plant. The government argued that this reallocation was mandated by Section 7(a)(2) of ESA.

Second, the Bureau official declared that approximately 59,000 acre feet of water would be involuntarily reallocated from Area I for delivery to wetland habitat areas. The government argued that such reallocation was mandated by Section 3406(d) of the CVPIA.

The government further asserted that these two involuntary reallocations were constitutional, arguing that Congress had impliedly reserved sovereign power to deprive Area I farmers of their water rights and had execised such power by enacting Section 7(a)(2) of ESA and Section 3406(d) of CVPIA. The government relied upon statements of this Court in *Bowen v. Public Agencies Opposed To Social Security Entrapment*, 477 U.S. 41, 52 (1986), that sovereign power will remain intact unless surrendered in unmistakable terms, and that the government's own obligations remain subject to subsequent legislation (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 148 (1982)).

The government also argued, based on the same claimed statutory mandates, that the two reallocations were not actionable by virtue of Article 11 of the 1963 contract. The government claimed that the alleged mandates of Section 7(a)(2) of ESA and Section 3406(d) of CVPIA constituted "other causes" within the meaning of that article.

In reply, petitioners presented substantial evidence and argument rebutting the government's contentions on the statutory elements of its defense. They showed that the fish and wildlife provisions of CVPIA and ESA were subject to certain limitations, conditions, and exceptions and that they contained other provisions protecting existing property rights.

Petitioners also presented factual and legal materials rebutting the constitutional elements of the government's

defense. They argued that the statutory mandates, even if they existed, would violate substantive due process under *Lynch*, 292 U.S. 571, and *Perry v. U.S.*, 294 U.S. 330 (1935).[8] Petitioners also argued that any statutory mandates violated the separation of powers doctrine.[9]

Petitioners further argued that Article 11 was ambiguous and had to be interpreted as inapplicable to any statutory mandates or, otherwise, was unenforceable.

On May 3, 1993 the merits of the government's defense were argued in the District Court. Upon the conclusion of oral argument the court announced that the matter stood submitted.

On May 17, 1993, while the case was under submission, the Westlands Water District, of which Area I was a major part, filed a second action in the District Court below entitled *Westlands Water Dist. v. U.S. Dep't of the Interior.*

On June 18, 1993 the District Court denied petitioners' previously submitted motion to enforce the judgment. The Court *sua sponte* took discretionary judicial notice of the new *Westlands* action and, based thereon, abstained on the statutory elements of the government's defense. The motion was denied, without prejudice, pending the outcome of *Westlands*. The court stated that petitioners may subsequently attempt to demonstrate that the Bureau's actions were unlawful, or that its method of compliance was wrongful, under CVPIA and ESA.[10]

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[8] Recent circuit court decisions apply *Lynch* and *Perry* and distinguish *Bowen*. *Winstar Corp. v. U.S.*, —— F.3d ——, 1995 WL 509409 (Fed. Cir. Aug. 30, 1995); *Hughes Communications Galaxy, Inc. v. U.S.*, 998 F.2d 953 (Fed. Cir. 1993); *Resolution Trust Corp. v. Federal Savings & Loan Ins. Corp.*, 25 F.3d 1493 (10th Cir. 1994).

[9] *U.S. v. Klein*, 80 U.S. 128, 146 (1871); *Hodges v. Snyder*, 261 U.S. 600, 603 (1923).

[10] The court also opined that petitioners lacked procedural standing to rebut the government's defense as to one of the three

The court found it unnecessary to reach certain constitutional elements of the government's defense. However, the court did hold that, if any statutory mandate existed, the United States' rights under Article 11 of the 1963 contract trumped Area I's water rights.

I. Motion For Findings And Conclusions

On July 8, 1993 petitioners filed a motion in the District Court for, among other things, additional findings of fact and conclusions of law relating to the statutory aspects of the government's affirmative defense. Petitioners argued that the court had an obligation to resolve the statutory issues.[11]

In its opposition brief the government, for the first time, asserted that it had effected an involuntary reallocation of approximately 166,000 acre feet of water for smelt purposes under Section 3604(b)(2) of CVPIA. In reply, petitioners rebutted the new statutory premise as to smelt.

Oral argument occurred on August 30, 1993. By this time the parties were almost at the end of the irrigation season.

The District Court denied the motion on September 10, 1993, publishing a second opinion. The court again abstained on the statutory elements of the government's defense. It stated that it was judicially inefficient to have two parallel cases proceeding simultaneously. The court further stated that the statutory issues would undoubtedly involve extremely complex and time-consuming proceedings.

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reallocations in question, the one allegedly mandated by Section 7(a)(2) of ESA for salmon purposes, as Commerce had not directly received a 60-day written notice from petitioners under ESA's citizen suit provision nor explicitly been named.

[11] They further showed that they had procedural standing to rebut the government's contention that ESA mandated the salmon reallocation.

This time, however, the District Court did reach remaining constitutional elements of the government's defense. It, held, with far-reaching consequences, that Congress had the power, notwithstanding substantive due process principles applicable to government obligations, to enact subsequent statutes having the effect of modifying those obligations.

J. Appellate Proceedings

Petitioners timely appealed, raising as one issue whether the District Court had erred by deciding the constitutional aspects of the government's defense, while simultaneously refusing to decide the statutory aspects. They argued that the District Court had been bound to decide the statutory mandate issues, and to decide them in their favor. They argued that any discretion the District Court had to abstain pursuant to its case management powers must be limited where, as here, it decided other aspects of the government's defense. They argued that the court had compounded its error of abstention by assuming for the sake of argument that the statutory predicates had been established and, on the basis thereof, rendering advisory opinions on the other aspects of the government's defense. Petitioners also argued that the court had erred on the merits of the constitutional and contractual issues.

The Court of Appeals affirmed the abstention. It held that district courts are entitled to discretion in managing cases within the federal system. It ruled that judicial economy is a primary consideration and to have adjudicated the statutory elements would have been "inefficient and unnecessary." App. A at 22a. Resolution of those matters in the subsequent *Westlands* case, it said, will enable a "comprehensive" resolution of the allocation problem. *Id.* The court quoted the District Court's state-

ment that the statutory issues would involve "extremely complex and time-consuming proceedings." [12] *Id.*

The Court of Appeals also upheld the District Court's ruling on the constitutional elements of the government's defense. It held that Area I's water rights were not immune from subsequently enacted statutes, citing only *Bowen.*

The Court of Appeals also affirmed, in substantial part, the lower court's ruling that Article 11 of the 1963 contract barred any remedy.

K. The Subsequent Action

During such appellate proceedings, trial court proceedings went forward in *Westlands.* The District's complaint in *Westlands* alleged claims for relief which were not as broad as those alleged by petitioners below. On July 28, 1993, an amended complaint was filed adding as plaintiffs, in addition to the District, two other districts within the Unit, as well as a fourth district outside the Unit.

On September 16, 1993, the Area I parties moved to intervene under Rule 24 of the Federal Rules of Civil Procedure, both as a matter of right and permissively. On October 1, 1993, the government filed a brief in opposition to intervention. On or about October 7, 1993, the plaintiffs and the Area I parties, but not the government, stipulated that the Area I parties may intervene, without specifying whether intervention was of right or permissive. On October 12, 1993, the court so ordered. Thereupon, the Area I parties filed their complaint as plaintiffs-in-intervention.

Thereafter, still other districts outside the Unit intervened on the side of the plaintiffs, and various commercial

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[12] The court also noted that the District Court had held that petitioners lacked procedural standing to refute the government's defense as to the salmon reallocation.

fishing, sport fishing, duck hunting, and environmental interest groups intervened as defendants-in-intervention.

The federal defendants and the defendants-in-intervention moved to dismiss the amended complaint and all complaints-in-intervention. With certain exceptions, the motions were denied. *Westlands Water Dist. v. U.S. Dep't of Interior*, 850 F. Supp. 1388 (E.D. Cal. 1994). The court held that certain of the Area I parties' claims were precluded under the collateral estoppel doctrine by its constitutional and contractual rulings below in the instant case. 850 F. Supp. at 1399-1401, 1426. The court acknowledged that those decisions had left open for later resolution the statutory issues. *Id.* at 1400. It stated that it had assumed for the purposes of decision of the other elements the existence of such statutory mandates. *Id.* at 1401.

At the beginning of water year 1994-1995 the government effected involuntary reallocations which, combined with low rainfall, resulted in a shortage of 65% of Area I's water. The District Court entered a preliminary injunction prohibiting the involuntary reallocations under CVPIA Sections 3406(b)(2) and (d) based on the government's failure to prepare an environmental impact statement. The injunction, however, was later vacated by the Court of Appeals. *Westlands Water Dist. v. NRDC*, 43 F.3d 457 (9th Cir. 1994).

Petitioners' continued status as intervenors in *Westlands* remains uncertain.[13]

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[13] There is uncertainty as to the basis for the intervention, whether it would be upheld if the government were to appeal, and whether petitioners' claims would survive were the plaintiffs to withdraw their claims.

REASONS FOR GRANTING THE WRIT

I. ABSTENTION ON THE STATUTORY ELEMENTS OF THE GOVERNMENT'S DEFENSE RESULTING IN A LOSS OF WATER RIGHTS WITHOUT A HEARING CONFLICTS WITH THIS COURT'S DECISIONS ON PROCEDURAL DUE PROCESS

The Court of Appeals has decided the abstention question in a way that conflicts with applicable decisions of this Court on procedural due process. The lower courts' refusal to adjudicate the statutory mandate issues deprived petitioners and other Area I farmers of their water rights and their related claims for equitable relief.

This Court has often held in various contexts that federal judges are bound to decide issues properly presented to them. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. 264, 404 (1821). "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . . . The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied." *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909). Federal courts are vested with a "virtually unflagging obligation" to exercise the jurisdiction given them. *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817-18 (1976). "[F]ederal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred." *New Orleans Public Serv. v. Council of New Orleans*, 491 U.S. 350, 358 (1989).

But where two pending federal cases involve the same or similar parties and claims, this Court has held that district courts possess a degree of discretion to order that litigation proceed in one, but not the other, action. *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition

of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.") (citations omitted); *Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183-84 (1952) (The lower courts have "discretion" as to matters of "[w]ise judicial administration.").

Landis involved two simultaneous federal suits relating to the newly enacted Public Utility Holding Company Act. The Securities and Exchange Commission sued various holding companies in New York to compel their registration under the Act. Other holding companies sued in the District of Columbia to invalidate the Act. The SEC successfully moved in the District of Columbia case to stay it until its New York suit had been finally resolved in this Court, or otherwise terminated. On appeal, the District of Columbia Court of Appeals reversed and remanded. This Court did not decide whether a brief stay of the District of Columbia suit until the New York district court had ruled was proper, but remanded that short-term issue to the district court for determination. As to the remainder of the stay, however, this Court held that "discretion was abused" by granting a stay of "indefinite duration" in the absence of a pressing need therefor. 299 U.S. at 256.

Here, abstention on the statutory aspects of the government's defense persisted for a sufficient duration to constitute such an abuse of discretion. By the end of the irrigation season no decision had been rendered on those issues, the water in question had flowed to the Pacific Ocean, and petitioners' water rights and claim for equitable relief with respect thereto were extinguished.

Procedural due process is denied where a court does not give a litigant an opportunity to be heard at a mean-

ingful time and in a meaningful manner.[14] *Armstrong v. Manzo*, 380 U.S. 545 (1965) (litigant improperly given burden of proof); *Saunders v. Shaw*, 244 U.S. 317 (1917) (litigant improperly denied opportunity to present evidence). Similarly, where the failure to decide a crucial issue timely results in the loss of a property right against the government the due process clause of the Fifth Amendment is violated.

In *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978), this Court reviewed a public utility's termination of water and other services to urban residents. Even though the residents had no rights to utility service, the Court held that their claim for relief was itself a protected property interest, saying: "Because petitioners may terminate service only 'for cause,' respondents assert a 'legitimate claim of entitlement' within the protection of the Due Process Clause." 436 U.S. at 11-12.[15]

A similar result occurred in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), where a state terminated an employee's administrative cause of action for wrongful discharge. The Court held that the complainant's "right to use" the state's "adjudicatory procedures" was a property right protected by the due process clause. 455 U.S. at 429, 431. It referred to "the right to an adjudication." *Id.* at 437. It further held that due process grants the aggrieved party the opportunity to present his case and "have its merits fairly judged." *Id.* at 433.

In the case at bar, Area I farmers owned the right to use 900,000 acre feet of water during the 1993-1994 water year. As massive quantities of that water flowed past the Golden Gate throughout the summer irrigation

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[14] A wrongful judicial decision may be "more than an abuse of discretion" where it is "a blatant denial of due process." *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, J., concurring).

[15] The Eleventh Circuit followed: *James v. City of St. Petersburg*, 6 F.3d 1457 (11th Cir. 1993).

season, their right to use it—and their right to compel its sale and delivery in court—were forever lost.

"[A] hearing which excludes consideration of an element essential to the decision . . . does not meet . . ." the requirements of procedural due process. *Bell v. Burson*, 402 U.S. 535, 542 (1971). Here, whether the three statutory provisions in fact mandated the particular involuntary reallocations in question was the central question of the case, and should have been decided in time to protect Area I farmers' property rights.

The Court in *Memphis Light* held that a determination of the central issue was required prior to cutting off water and other utilities: "Under the balancing approach outlined in *Mathews* [*v. Eldridge*, 424 U.S. 319 (1976)], some . . . procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services." 436 U.S. at 18. Other decisions of this Court have held that a hearing and a determination is required under the due process clause "before" the property right is deprived. *Bell*, 402 U.S. at 542; *Logan*, 455 U.S. at 434.

Here, the abstention decision effectively ordained that the adjudication of the existence or nonexistence of any statutory mandate would occur, if at all, after the water available for use during the 1993-1994 irrigation season could no longer be delivered. If the government's statutory contentions lack merit, as petitioners contend, it is too late to obtain any equitable remedy as to that year.

II. DECISION OF THE CONSTITUTIONAL ELEMENTS OF THE GOVERNMENT'S DEFENSE AFTER ABSTENTION ON THE STATUTORY ELEMENTS CONFLICTS WITH THIS COURT'S DECISIONS ON RIPENESS AND ADVISORY OPINIONS

Decision of the constitutional elements of the defense, without having first decided the statutory elements, con-

flicts with this Court's decisions on ripeness and advisory opinions.

If the District Court had decided the statutory elements of the government's defense and decided them in petitioners' favor, there of course would have been no occasion to reach the other elements of the government's defense. In that event, adjudication of such elements was wholly unnecessary and wasteful.

The same is true where, as here, the statutory premises of the defense went undecided. An abstracted and unfocused question which has not emerged precisely framed and necessary for decision produces an improper advisory opinion. *U.S. v. Fruehauf*, 365 U.S. 146, 157 (1961). The Court will not sanction a tentative or unnecessary ruling, especially a premautre constitutional adjudication. *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941). The basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements . . . ." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985).

These principles operate with particular force in the constitutional context. In the exercise of its jurisdiction over constitutional questions, this Court is bound by a rule, to which it has rigidly adhered, ". . . never to anticipate a question of constitutional law in advance of the necessity of deciding it . . . ." *Liverpool, N. Y. & P. S. S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885); *U.S. v. Raines*, 362 U.S. 17, 21 (1960). "No rule of practice of this Court is better settled . . . ." *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 71-72 (1961). ". . . [O]ur reluctance to decide constitutional questions unnecessarily . . . is grounded in the constitutional role of the federal

courts . . . ." *Bowen v. U.S.*, 422 U.S. 916, 920 (1975) (citations omitted).

This principle is applicable where, as in the case at bar, a party makes both statutory and constitutional assertions. In *Califano v. Yamasaki*, 442 U.S. 682 (1979) the government claimed the power to recoup, without conducting a hearing, erroneous Social Security overpayments. Recipients claimed that a hearing was required under both the statute and the due process clause. This Court found it unnecessary to determine the constitutional issue, saying:

> "A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question. . . . Due respect for the coordinate branches of government, as well as a reluctance when conscious of fallibility to speak with our utmost finality, . . . counsel against unnecessary constitutional adjudication." 442 U.S. at 692-93 (citations omitted).

In *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147 (1983), a case involving a claim that a statute allegedly outlawing handbill distribution violated the First Amendment, the Court declined to reach the constitutional issue as it had not yet been decided whether the handbill distribution in question was proscribed by the act. Said the Court: "Until the statutory question is decided, review of the constitutional issue is premature." 463 U.S. at 158.

Here, abstention on the statutory predicates of the government's affirmative defense rendered decision of the constitutional elements thereof unnecessary, wasteful, advisory, and unripe. Having stoutly refused to evaluate the merits of the government's allegations of statutory mandate, the District Court should not have reached out in its second decision for the substantive due process issues, and the Court of Appeals should not have affirmed.

The court's summary reliance on *Bowen* for the ruling that Area I water rights were not immune from subsequently enacted statutes was a blatant violation of this Court's rule never to anticipate a constitutional question in advance of the necessity of deciding it. The ruling has had, and will have, significant preclusive and precedential impacts on Area I and other water users.

The courts below had it exactly backwards. They should have decided the central statutory mandate issues under CVPIA and ESA first. Failing that, they should not have reached unnecessarily the constitutional and contractual elements of the government's defense.

III. ABSTENTION ON THE STATUTORY ELEMENTS OF THE GOVERNMENT'S DEFENSE IN CONJUNCTION WITH DECISION OF THE CONSTITUTIONAL ELEMENTS CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS REQUIRING CAREFUL STATUTORY SCRUTINY

The Court of Appeals decision conflicts with those of this Court and other circuit courts requiring the decision of statutory issues in conjunction with the decision of intertwined constitutional and contractual issues.

Kerotest states that due regard should be given to "comprehensive" disposal of litigation. 342 U.S. at 183. *Colorado River* notes that one relevant factor is "the desirability of avoiding piecemeal litigation." 424 U.S. at 818. The piecemeal abstention effected below materially impairs the prospects of a comprehensive resolution.

The constitutional elements of the government's defense are factually and legally entwined with the statutory elements. The attempt neatly to eliminate the statutory questions from the web of law and fact before the court below was certain to affect the remaining constitutional strands. The statutory elements of the defense were inseparable from the other elements in four key respects.

First, careful scrutiny of CVPIA and ESA was required in order to decide the constitutional issues. In *Perry*, which struck down a statute impairing federal bond obligations, the Court indicated that, compared to the abrogation of private obligations, the abrogation of public obligations warrants careful judicial scrutiny, as follows:

> "The bond in suit differs from an obligation of private parties, . . . whose contracts are necessarily made in subjection to the dominant power of the Congress. The bond now before us is an obligation of the United States. . . .
>
> ". . . There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements . . . ." *Id.* at 348, 350-51 (citation omitted).

In *U.S. Trust*, 431 U.S. 1, which invalidated a bi-state statute impairing bond obligations under the contract clause, the Court cited *Perry* as authority for this "dual standard" of review, noting that "careful scrutiny" is appropriate where the government's own obligations are abrogated by subsequent statute. 431 U.S. at 26 n.25, 29 n.27. The Court held that the environmental statute under challenge there would be constitutional only if the government showed that it was "necessary" to serve an important public purpose. *Id.* at 112, 114. The Court said that "complete deference" to the legislative assessment of necessity is not appropriate in the government contract setting because "the State's self-interest is at stake." *Id.* at 112. In applying this elevated standard, the Court acknowledged that the environmental goals behind the statute were important. But it held that the statute was not necessary, as "alternative means" which were "less drastic" were available. *Id.* at 114.

Here, the Court of Appeals upheld abstention on the statutory aspects of the government's defense, where, instead, careful scrutiny of CVPIA and ESA and the alternative methods of compliance available thereunder was essential in deciding the constitutional issues. Adjudicating the constitutionality of the statutes required the courts below to analyze them, not ignore them.

Second, in *Lynch* the Court stated that the question requiring decision was whether a statute repealing yearly renewable term insurance issued by the government had "aimed" at the rights of policy beneficiaries. 292 U.S. at 583. The Court held that such aim had been taken, and unconstitutionally so under the due process clause.

To similar effect is *Resolution Trust,* which held the Financial Institutions Reform, Recovery, and Enforcement Act unconstitutional. The Tenth Circuit held that, under *Perry* and *Lynch,* an assessment had to be made as to whether FIRREA had "targeted" the government's pre-existing obligations to savings and loans associations. 25 F.3d at 1501. Congress, it held, had done so, as careful review of FIRREA's structure revealed that it "well knew" the crippling effects of the statute and "attempted to mitigate" them. *Id.* at 1502.

In *Winstar,* the Federal Circuit also followed *Lynch* and *Perry* in striking down FIRREA. It held that FIRREA "plainly singles out . . . for special treatment" the rights of the plaintiffs against the government. 1995 WL 509409 at 20. It said that the statute had "targeted" those rights. *Id.* at 21.

Similarly, here, in order to decide the constitutional elements of the government's defense, the District Court and the Court of Appeals had to scrutinize CVPIA and ESA to determine whether Congress had, in fact, aimed at or targeted Area I's water rights. The constitutional elements of the defense could not be decided in isolation from the statutory elements.

Third, in *Resolution Trust* the Tenth Circuit also held that an agency breaches its obligations where they ". . . could have been honored by the exercise of the discretion afforded them by Congress." 25 F.3d at 1501. The court's review of the structure of FIRREA led it to conclude that FIRREA granted such "discretion" under several exemption mechanisms. *Id.* at 1502.

Here, in order to reach the constitutional and contractual elements of the government's defense the District Court and Court of Appeals were bound to review CVPIA and ESA carefully to determine whether the Bureau had discretion to honor Area I's water rights thereunder. Had the courts below not declined to evaluate the merits of the statutory issues, they would have found that the Bureau had such discretion.[16]

Fourth, Section 3406(b) of CVPIA mandates that Interior ". . . shall operate the [CVP] to meet all obligations under State and Federal law. . . ." Section 3411(a) directs that Interior shall obtain permit modifications prior to any change of purpose or place of use. Section 3408(k) of the CVPIA provides that "nothing in [CVPIA] is intended to alter the terms of any final judicial decree confirming or determining water rights." Congress specifically intended thereby to protect the 1986 stipulated judgment. 128 Cong. Rec. S17659-60 (daily ed. Oct. 8, 1992).

Thus, the courts below could not properly determine what Area I's water rights were without simultaneously analyzing CVPIA's provisions protecting those very same rights.

In sum, the courts below erred by abstaining piecemeal on some, but not all, elements of the defense. Deciding the statutory issues was required in order to decide

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[16] Indeed, the Bureau should have acquired any water rights necessary to carry out all duties. *Ivanhoe*, 357 U.S. at 290-92.

the other interwoven issues. Partial abstention in this context was also an abuse of discretion.[17]

IV. ABSTENTION ON THE STATUTORY ELEMENTS OF THE GOVERNMENT'S DEFENSE AFTER THEY HAD BEEN TRIED CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS ON WHICH OF TWO CASES YIELDS TO THE OTHER

The Court of Appeals has rendered a decision on the abstention issue in conflict with the decisions of this Court and other courts of appeals as to whether later litigation must yield to earlier.[18]

Kerotest arose out of two federal patent suits. The owner of a patent sued a buyer of allegedly infringing goods in an Illinois district court. Thereafter the manufacturer of those goods sued the patent owner in a Delaware district court claiming noninfringement. Then that manufacturer was added as a defendant in the Illinois suit. The Delaware court refused a stay motion and enjoined the patent owner from proceeding against the

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[17] This is not a situation where the District Court exercised its discretion to order a later trial of a separate issue in the same case. Fed. R. Civ. Proc. Rule 42(b). Even in that permissive environment the severed issue must be distinct and separate from, not interwoven with, the others. *Gasoline Prod. Co. v. Champlin Ref. Co.*, 283 U.S. 494, 500 (1931).

[18] *Landis* held that ". . . the burden of making out the justice and wisdom of a departure from the beaten track lay heavily . . ." on the party asking a court to abstain. 299 U.S. at 256. He ". . . must make out a clear case of hardship or inequity in being required to go forward, if there is ever a fair possibility that the stay for which he prays will work damage to someone else." *Id.* at 255. Here, the government neither attempted to carry nor carried that heavy burden. It made out no clear case for partial abstention, nor any case at all. Indeed, the District Court abstained initially on its own motion after the enforcement matter had been submitted without hearing from the government, let alone petitioners, on the subject of abstention.

manufacturer in Illinois, holding that, absent exceptional circumstances, the first suit to bring both such parties to bar should proceed. The court of appeals reversed, holding that only the Illinois case could resolve all claims. This Court affirmed. The Court indicated that due regard should be given to "conservation of judicial resources." 342 U.S. at 183. *Colorado River* states that ". . . the general principle is to avoid duplicative litigation." 424 U.S. at 817.

The District Court's belated abstention here did not conserve resources, but wasted them, and did not avoid duplication, but insured it. Abstention was not invoked until after the parties had submitted legal briefs, declarations, and exhibits, the court had heard oral argument, and the case had been submitted. Abstention at that late stage insured that all such progress would be for naught and that all work would have to be repeated in the *Westlands* case.

Even if *Westlands* had been filed simultaneously, the simplified post-judgment enforcement process invoked below (the process specified in the 1986 stipulated judgment) could have allowed adjudication of the statutory elements of the government's affirmative defense much more efficiently than the motion-intensive, discovery-laden, multi-party lawsuit instituted by the District in *Westlands,* which still after two years plods along, unresolved.

The circumstances permitting abstention for reasons of wise judicial administration are "considerably more limited" than those appropriate for those forms of abstention arising from principles of federalism. *Colorado River,* 424 U.S. at 818. "Only the clearest of justifications. . . ." will warrant abstention on case management grounds. *Id.* at 819. As to which of two federal cases should proceed, ". . . no precise rule has evolved . . ." for governing the exercise of discretion. *Id.* at 817. But, at least in certain cases. the court "first assuming jurisdiction" over property may exercise jurisdiction to the exclusion of others. *Id.* at 818.

The question of the management of multiple federal cases has received substantial appellate attention since *Landis* and *Kerotest* in the Second Circuit. The general rule in that circuit is that the case first in time proceeds. *E.g., Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1201-04 (2d Cir. 1970) ("general rule that . . . the second action should give way to the first"); *First City National Bank & Trust Co. v. Simmons*, 878 F.2d 76, 79-80 (2d Cir. 1989) ("well settled principle"); *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1025-26 (2d Cir. 1991) (the "first filed" rule); *Adam v. Jacobs*, 950 F.2d 89, 92-94 (2d Cir. 1991).

The first-in-time rule "embodies" considerations of judicial administration and conservation of resources. *First City*, 878 F.2d at 80. As the Second Circuit explained in *City of New York*, 932 F.2d at 1026:

> "Judicial economy argues that two courts should not expend their energies on [one] matter. In determining which court should, the fact that the [second] court will be handling *similar* matters weighs far less on the efficiency scale than the fact that [the first] court has already spent considerable time and effort dealing with the exact *same* case, an assessment already captured by the 'first filed' rule." (emphasis in original)

The Second Circuit recognizes an exception to the general rule. *Adam*, 950 F.2d at 92 ("balance of convenience . . . or . . . special circumstances"); *First City*, 878 F.2d at 79; *City of New York*, 932 F.2d at 1025 "special circumstances"); *Semmes Motors*, 429 F.2d at 1202 ("balance of convenience"). In none of the Second Circuit cases discussed above, however, was this exception held to operate. Indeed, in *Adam*, as in *Landis*, the district court's decision to halt the first suit was held to have gone "beyond the allowable bounds of discretion." 950 F.2d at 92 (quoting *Semmes Motors*, 429 F.2d at 1204).

Here, the case below was first in time. The District Court and the litigants had spent considerable time and effort and, indeed, tried the statutory mandate questions before the second suit was filed. The government attempted no showing of special circumstances nor inconvenience. The court's invocation of efficiency was too facile. The real effect of abstention was to waste resources and, at the same time, allow water rights and equitable claims for relief relating thereto to expire forever before a hearing resulting in a determination on the merits was held.[19]

The Second Circuit implements *Landis* and *Kerotest* with a first-in-time general rule, allowing a contrary result in special cases. The Ninth Circuit, on the other hand, as illustrated by the case below, tolerates unfettered district court discretion unguided by any such timing rule. This Court should resolve this conflict.[20]

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[19] The first-filed rule is especially compelling where, as here, the first action is a post-judgment enforcement motion. *Emrick v. Bethlehem Steel Corp.*, 624 F.2d 450, 453 (3d Cir. 1980); *Martini v. Republic Steel Corp.*, 532 F.2d 1079, 1081 (6th Cir. 1976), *cert. denied*, 429 U.S. 927 (1976).

[20] The District Court's opinion about petitioners' supposed lack of "procedural standing" did not relate to the reallocations for smelt purposes under Section 3406(b)(2) or for wetland habitat purposes under Section 3406(d) of CVPIA. As to the reallocation for salmon purposes under Section 7(a)(2) of ESA, the court's opinion was incorrect for these reasons: (1) The relief provided by ESA's citizen suit provision shall not restrict any right to seek any other relief. 16 U.S.C. § 1540(g)(5). Such provision is not an exclusive remedy. *Libby Rod & Gun Club v. Poteat*, 457 F. Supp. 1177, 1185 (D. Mont. 1978). (2) Petitioners did not commence a civil suit to enjoin any government agency alleged to be in violation of any provision of ESA. 16 U.S.C. § 1540(g)(1)(A). Instead, they commenced post-judgment enforcement proceedings to enjoin government agencies alleged to be in violation of their water sale and delivery obligations. After the government asserted ESA by way of defense, petitioners exercised their right to refute that assertion. (3) More than 60 days prior to commencement petitioners gave written notice to the United States of any violation. See

CONCLUSION

Abstention in this case deprived petitioners of their property rights and, thereby, affronted this Court's recent jurisprudence on procedural due process. Adjudicating the constitutional elements of the government's defense, while abstaining on the statutory elements, violated the rules against unripe adjudication and advisory opinion. The refusal to scrutinize CVPIA and ESA was also erroneous, because the statutory aspects of the government's defense were necessarily interwoven with the remaining aspects. And abstention was also an abuse of discretion, as it ignored the manifest efficiencies of applying the first-in-time principle.

For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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Sierra Club v. Block, 614 F. Supp. 488, 492 (D.D.C. 1985). (4) The United States was named in the underlying action, was a party to the 1986 stipulated judgment, and was named in the proceedings below.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 93-17154

EDWIN R. O'NEILL, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

Argued and Submitted Nov. 16, 1994

Decided March 14, 1995

Landowners and water users within area of water district moved to enforce stipulated judgment requiring United States to perform water service contract with district. The United States District Court, Eastern District of California, Wanger, J., 849 F.Supp. 717, denied motion and plaintiffs appealed. The Court of Appeals, Choy, Circuit Judge, held that: (1) provision of water services contract stating that government would not be held liable for damages arising from shortage in water supplied on account of errors in operation, drought, or "any other causes" unambiguously relieved government from liability in connection with unavailability of water resulting from mandates of valid legislation; (2) government statements in news releases and feasibility reports were not admissible extrinsic evidence under Uniform Commercial Code

(UCC) for purposes of construing water services contract; (3) remarks of "high government officials" were not admissible to contradict clear contract term and, in any event, did not amount to "express warranties"; (4) explanatory recitals in contract did not create express warranty of water's availability; (5) even if contract did obligate government to supply specified amount of water without exception, contract was not immune from subsequently enacted statutes; (6) contract provision relieving government from liability for water shortages was not liquidated damage clause, was not unenforceable on grounds that purpose of remedy provision had failed, was not unconscionable, and was not void against policy of law; and (7) it was within district court's discretion to decline to evaluate compliance with Endangered Species Act (ESA) and Central Valley Project Improvement Act (CVPIA), which issues would be addressed in parallel federal litigation.

Affirmed.

Before CHOY, FARRIS, and BRUNETTI, Circuit Judges.

CHOY, Circuit Judge:

Landowners and water users within "Area I" of the Westlands Water District appeal the district court's denial of their motion to enforce a stipulated judgment which required the United States to perform a 1963 long-term water service contract with the Westlands Water District. The district court held that the contract does not obligate the government to furnish to Westlands the full contractual amount of water when that water cannot be delivered consistently with the requirements of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and the Central Valley Project Improvement Act ("CVPIA"), Pub.L. No. 102-575, 106 Stat. 4706 *et seq.* The district court further held that Area I could seek judicial review of the agency actions which culminated in the contested water allocation, but that it must do so in a separate suit. We affirm these rulings.

I.

In 1963, the United States entered into a long-term water service contract with Westlands Water District pursuant to federal reclamation statutes. Under this contract, the United States agreed to construct the San Luis Unit of the Federal Central Valley Project ("CVP") in part to furnish water to the Westlands Water District. The CVP is the country's largest federal water reclamation project. The United States agreed to furnish, and the District agreed to pay for 900,000 acre-feet of water annually subject to Article 11(a) which limits the government's liability for water shortages caused by "errors in operation, drought, or any other causes." Prior to executing the contract, the government conducted feasibility studies and the landowners and other interested parties testified before Congress in support of the project.

Until 1978, both parties performed the contract. Except for one year of drought, a minimum of 900,000 acre-feet of water was delivered annually to Area I landowners and water users. Bolstered by the water supply from the San Luis Unit, the landowners were able to expand their farming operations. However, in 1978, the government refused to perform the contract, maintaining that it was invalid. From that year until 1986, the government required the Westlands District to enter into interim contracts which permitted the government to divert water from Area I "for reasons other than dry or critically dry year," for reasons of "water quality control" in the Delta, or "for any environmental . . . reasons." Then, in 1986 the parties stipulated to, and the court entered, a judgment ordering the United States to perform the 1963 contract.

In November of 1990, the Sacramento River winter-run chinook salmon was listed as a threatened species under the Endangered Species Act. 50 C.F.R. § 227.4 (1993). ESA was enacted in 1973 to "halt and reverse the trend toward species extinction, whatever the cost." *Tennessee Valley Auth. v. Hill,* 437 U.S. 153, 184, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978). ESA Section 7(a)(2) requires all federal agencies "in consultation with and with the assistance of the Secretary [of the Interior or Commerce, to] insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species. . . ." 16 U.S.C. § 1536(a)(2). Accordingly, when the winter-run chinook salmon was listed as a threatened species, the Bureau of Reclamation ("Bureau") entered into ESA consultation with the National Marine Fisheries Service ("NMFS"). As a result of this consultation, NMFS issued a biological opinion which concluded that the Bureau's continued operation of the CVP in the water year 1992-1993 was likely to jeopardize the continued existence of the salmon population. The opinion noted that jeopardy to the

salmon could be avoided if the Bureau operated the CVP in accordance with certain prescribed alternatives.

While the Bureau was developing its initial 1993 CVP water allocation, the United States Fish and Wildlife Service issued a notice of intent to list another species of fish indigenous to the Sacramento-San Joaquin Delta, the delta smelt, as a threatened species. The delta smelt was listed on March 5, 1993. 50 C.F.R. § 17.11 (1993). Consultation and a biological opinion followed with a result analogous to that in the salmon case.

In October 1992, Congress enacted CVPIA, amending the 1937 CVP reauthorization statute. CVPIA seeks to achieve "a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." Section 3402(f). Section 3406(b)(2) of the CVPIA directs the Secretary to

> dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act.

On February 15, 1993, the Bureau announced its initial allocation of CVP water for 1993. Under the final allocation, agricultural contractors south of the Sacramento-San Joaquin Delta, such as the Westlands District, were to receive only 50 percent of their contractual supply of

water. Contractors north of the Delta were to receive 100 percent of their supply, as were "exchange contractors" south of the Delta.

On March 26, 1993, Area I filed a motion to enforce the 1986 stipulated judgment. The government argued that compliance with ESA and CVPIA required it to reduce the amount of water supplied to Area I and that such a reduction was covered by the liability limitation in Article 11 of the contract. The district court agreed with the government that Article 11 limited Area I's contractual rights to delivery of the 900,000 acre-feet of CVP water. The court also held that Area I could seek judicial review of the agency actions which culminated in the 1993 water allocation, but that it must do so in a separate suit. At the time of the district court's decision, the Westlands Water District had already filed such a suit in the same court; Area I has subsequently intervened. *Westlands Water Dist. et al. v. United States et. al.*, 850 F.Supp. 1388 ("Westlands case").[1]

In this appeal, Area I raises the following issues: (1) whether Article 11(a) of the water service contract, which absolves the government of liability for water shortages due to drought or "any other causes," excuses the government from supplying the full contractual amount of water; (2) whether the district court should have considered extrinsic evidence in interpreting the water service contract; (3) whether the government expressly warranted that the contractual amount of water would be available; (4) whether Article 11 is valid and enforceable; and (5) whether the district court should have

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[1] In that case, the district court preliminarily enjoined implementation of two of CVPIA's fish and wildlife provisions, sections 3406(b)(2) and (d)(1), on the ground that implementation of these sections would violate the National Environmental Policy Act, 42 U.S.C. § 4332 (1988). We have vacated the preliminary injunction. *Westlands Water Dist. v. NRDC*, 43 F.3d 457 (9th Cir.1994).

decided if environmental statutes did, in fact, mandate the reduction in water delivery to Area I.

II.

This court reviews *de novo* principles of contract interpretation as applied to the facts. *Aetna Casualty and Surety Co. v. Pintlar Corp.*, 948 F.2d 1507, 1511 (9th Cir.1991). In particular, the determination of whether contract language is ambiguous is a question of law. *Carpenters Pension Trust Fund v. Underground Constr. Co.*, 31 F.3d 776, 778 (9th Cir.1994).

Federal law governs the interpretation of contracts entered into pursuant to federal law where the government is a party. *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir.1989).

A.

Article 11(a) of the water service contract provides that the government shall not be held liable for "any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes."[2] The government contends this language is

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[2] Article 11 provides:

UNITED STATES NOT LIABLE FOR WATER SHORTAGE

(a) There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes. In any year in which there may occur a shortage from any cause, the United States reserves the right to apportion the available water supply among the District and others entitled under the then existing contracts to receive water from the San Luis Unit in accordance with conclusive determinations of the Contracting Officer as follows:

(i) A determination shall be made of the total quantity of water agreed to be accepted during the respective year

broad and unambiguous and that shortages stemming from mandatory compliance with ESA and CVPIA are

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> under all contracts then in force for the delivery of Central Valley Project water by the United States from the San Luis Unit, the quantity so determined being hereinafter referred to as the contractual commitments;
>
> (ii) A determination shall be made of the total quantity of water from the Central Valley Project which is available for meeting the contractual commitments, the quantity so determined being hereinafter referred to as the available supply;
>
> (iii) The total quantity of water agreed to be accepted by the District during the respective year, under Article 3 hereof, shall be divided by the contractual commitments, the quotient thus obtained being hereinafter referred to as the District's contractual entitlement; and
>
> (iv) The available supply shall be multiplied by the District's contractual entitlement and the result shall be the quantity of water required to be delivered by the United States to the District for the respective year, but in no event shall such amount exceed the total quantity of water agreed to be accepted by the District pursuant to Article 3 hereof.
>
> Insofar as determined by the Contracting Officer to be practicable, the United States will, in the event a shortage appears probable, notify the District of such determinations in advance of the irrigation season.
>
> (b) In the event that in any year there is delivered to the District by reason of any shortage or apportionment as provided in subdivision (a) of this article or any discontinuance or reduction of service as set forth in subdivision (d) of Article 9 hereof, less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year in a manner similar to that provided for in Article 7. To the extent of such deficiency, such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.
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> (c) The United States assumes no responsibility with respect to and does not warrant the quality of the water to be furnished pursuant to this contract. . . .

shortages resulting from "any other cause." Therefore, the government concludes, it is not liable for its failure to deliver the full contractual amount of water to Area I. Area I maintains that the contract language is ambiguous, and limits the government's liability for water delivery only in the event of a "temporary emergency" such as a "rare time[] of severe drought." Appellants' Opening Brief at 9.

"A contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Kennewick*, 880 F.2d at 1032. Area I finds ambiguity where none exists; the terms of Article 11(a) admit of one meaning and are internally consistent. On its face, Article 11(a) unambiguously disclaims any liability for damages in the event the United States is unable to supply water in times of shortage. Clearly captioned "United States Not Liable for Water Shortage," Article 11 explicitly recognizes that "[t]here may occur at times during any year a shortage in the quantity of water available for furnishing to the District" and provides that "in no event shall any liability accrue against the United States . . . for any damages . . . arising from a shortage on account of errors in operation, drought, *or any other causes*." (emphasis added). As the district court duly noted, there are no enumerated exceptions to this provision: "Westlands, as the contracting party, did not include any language of limitation in the contract." *Barcellos and Wolfsen, Inc. v. Westlands Water Dist.*, 849 F.Supp. 717, 723 (E.D.Cal.1993).

Area I claims that other provisions of the contract render the language "shortage on account of . . . any other causes" ambiguous. It asserts that a provision which grants Westlands an option to renegotiate terms consistent with future amendments in reclamation law creates an ambiguity. Article 26 provides, in relevant part:

> In the event that the Congress of the United States . . . amends . . . provisions of the Federal reclamation laws, the United States agrees, at the option of the District, to negotiate amendments of appropriate articles of this contract, all consistently with the provisions of such . . . amendment.

The contract preamble recites that the contract was entered into pursuant to the federal reclamation laws.

Area I contends that because Article 26 and the contract preamble explicitly reference statutes, whereas the phrase "any other causes" does not explicitly include the effects of subsequently enacted statutes, the scope of "any other causes" is ambiguous.

"[A]ny other causes" is a catchall phrase that does not "explicitly" include *any* particular causes. Contrary to Area I's position, the specific reference to reclamation law in Article 26 is not at all inconsistent with the notion that "any other causes" broadly and unambiguously contemplates the effects of subsequent Congressional mandates. Consistently with this court's prior interpretation of identical language, in the event that reclamation law is amended, Article 26 gives the water districts "a choice between renegotiating their contracts to bring them into conformity with the new law or withdrawing from the reclamation program." *Peterson v. United States Dept. of Interior*, 899 F.2d 799, 812 (9th Cir.), *cert. denied*, 498 U.S. 1003, 111 S.Ct. 567, 112 L.Ed.2d 574 (1990). Relieving the government from liability for delivering Westlands' full contractual amount of water where a reduction is mandated by statute, including by amendments to reclamation law, is not incompatible with giving Westlands an option to renegotiate its contract to conform to changes in reclamation law. Article 26 does not, therefore, render ambiguous the scope of "any other causes." [3]

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[3] Area I also argues that, properly interpreted, sufficient water was "available" to serve all CVP contractors their full entitlements

We conclude that the contract's liability limitation is unambiguous and that an unavailability of water resulting from the mandates of valid legislation constitutes a shortage by reason of "any other causes."

B.

The inquiry, however, does not necessarily stop at the four corners of the contract. The district court's opinion asserted, "[t]he terms at issue are not defined in the contract but they are clear on their face. . . . There is no need to examine extrinsic evidence as to the parties' intended meaning." 849 F.Supp. at 723. To the extent the district court's opinion could be read to hold extrinsic evidence is inadmissible to interpret the terms of a facially unambiguous written instrument, the opinion misstates the law. To the contrary, under the Uniform Commercial Code extrinsic evidence of usage of trade, course of dealing and course of performance may be considered in determining whether a contract is ambiguous. U.C.C. § 2-202.

The Uniform Commercial Code is a source of federal common law and may be relied upon in interpreting a contract to which the federal government is a party. *Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 189 (5th Cir.), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984). The Code permits the use of extrinsic evidence in a manner that sub-

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under the contract. Consequently, it maintains, there was no "shortage" which would absolve the United States of liability under Article 11. This argument must be rejected, as it is fundamentally a restatement of the contention that the government may not deny Area I its full contractual allotment unless water is not available because of a rare emergency, such as drought. As we have concluded, such an interpretation of the term "shortage" impermissibly ignores the clear language of the contract which limits the government's liability when there is a shortage in the amount of water available for delivery to Westlands "on account of . . . drought . . . or any other causes."

stantially nararows the traditional application of the parol evidence rule. U.C.C. Section 2-202 provides:

> Terms . . . which are . . . set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> > (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and
> >
> > (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

As the Official Comment states, "[t]his section definitely rejects . . . [t]he requirement that a condition precedent to the admissibility of the type of evidence specified in paragraph (a) is an original determination by the court that the language used is ambiguous." U.C.C. § 2-202, Comment § 1(c). Consistently with this interpretation, this court has observed that "[t]he Code lets in evidence of prior dealings, usage, and performance under 2-202(a) *even if* the contract terms are clear." *Nanakuli Paving & Rock Co. v. Shell Oil Co.*, 664 F.2d 772, 783 n. 16 (9th Cir. 1981); *see also Bloom v. Hearst Entertainment, Inc.*, 33 F.3d 518, 523 (5th Cir.1994); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 9 (4th Cir.1971).

The government fails to support its contention that extrinsic evidence may not be considered in determining whether a contract is ambiguous. It cites *Wilson Arlington Co. v. Prudential Ins. Co.*, 912 F.2d 366 (9th Cir. 1990), a case which may readily be distinguished. In *Wilson Arlington*, this court was applying Virginia common law which, in contrast to the U.C.C., strictly ad-

heres to the parol evidence rule. *Id.* at 371.[4] *Pavlik v. Consolidation Coal Co.*, 456 F.2d 378 (6th Cir.1972), similarly fails to advance the government's argument, as that case applies Ohio common law principles of contract interpretation.

Nevertheless, we affirm the district court's refusal to consider the extrinsic evidence proffered by Area I as it is not the kind of evidence that U.C.C. Section 2-202 renders admissible. Area I points to government statements in news releases and feasibility reports as evidencing intent contrary to the language of the contract, and seeks to establish that subsequent to signing the contract certain Westlands landowners subjectively believed that Article 11's liability limitation could only be triggered by drought. This evidence is not relevant to usage of trade, which is defined in U.C.C. Section 1-205(2) as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." Nor does this evidence purport to establish a course of dealing, defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-205(1). Nor is this evidence relevant to establishing a "course of performance accepted or acquiesced in without objection." U.C.C. § 2-208.

C.

Area I argues that Article 11(a)'s liability limitation is inoperative because the government expressly warranted

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[4] In cases where the U.C.C., as adopted by Virginia, applies, the outcome has been to the contrary. In *Columbia Nitrogen Corp.*, for example, the Fourth Circuit applied U.C.C. Section 2-202 as adopted by Virginia and held that "a finding of ambiguity is not necessary for the admission of extrinsic evidence about the usage of the trade and the parties' course of dealing." 451 F.2d at 9.

that water would be available to fulfill the contract. Area I contends that statements of "high government officials," including former President John F. Kennedy, created such an express warranty. We decline, however, to consider these statements. Although the U.C.C. permits extrinsic evidence to be considered in determining whether a contract is ambiguous, once a contract is found to be unambiguous the parol evidence rule excludes statements offered to contradict a clear contract term in a final [5] expression of agreement. U.C.C. § 2-202; *Pierce County Hotel Employees & Restaurant Employees Health Trust v. Elks Lodge, B.P.O.E., No. 1450*, 827 F.2d 1324, 1327 (9th Cir.1987). An express warranty of availability would contradict Article 11's unambiguous disclaimer of liability for shortages in water available for supply to Westlands. *See* 1 J. White & R. Summers, Uniform Commercial Code, § 12-4, at 568 n. 2 (3rd ed. 1988) ("If . . . the writing that includes a disclaimer is intended to be final, most courts hold that parol warranties are 'contradictory' within 2-202 and hence inadmissible.").

Even if the remarks of "high government officials" were admissible to contradict the clear terms of the contract, they would not amount to an express warranty. U.C.C. Section 2-313(1) defines an express warranty as follows:

> (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise
>
> (b) Any description of the goods which is made part of the basis of the bargain. . . .

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[5] Although the district court does not explicitly find that the contract was intended to be final, Area I does not argue to the contrary. The fact that the contract was approved by the President, Congress, and all of the landowners in Westlands Water District indicates the finality of the agreement.

The first presidential statement Area I cites is merely congratulatory: "I believe that all Californians' [sic] will remember the leadership which your distinguished Governor has given to this great cause of making water available to the people of this State." Excerpts from John F. Kennedy's Remarks at Ground Breaking Ceremonies at the San Luis Dam (Aug. 18, 1962). The President also stated "[w]ater will be made available to 350,000 acres." Remarks at the White House approving the 1963 Service Contract (Jan. 28, 1963). These statements cannot reasonably be considered a guarantee that the full contracted amount of water would always be available.

The other statements of government officials cited by Area I are predictions and opinions. For example, Mr. Harvey O. Banks, Director of the California Department of Water Resources, testified before Congress: "It is my opinion that there does in fact exist . . . surplus water sufficient to serve both of these projects." Transcript of Hearings before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, House of Representatives (Jan. 15-17, 1958). Congratulatory political statements and opinions by government officials do not amount to an "affirmation" of a guaranteed availability of water which could reasonably be considered the "basis of the bargain."

Area I also points to explanatory recitals in the 1963 contract as creating an express warranty of avalability. The preamble relates that there will be available for furnishing to Westlands an additional water supply from the San Luis Unit. The district court correctly concluded that these recitals do not amount to a warranty of availability. The cases on which Area I relies highlight the weakness of its argument. *See, e.g., Gulf Oil Corp. v. Fed. Power Comm'n,* 563 F.2d 588 (3rd Cir.1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1978). In *Gulf Oil,* the Third Circuit found that the seller had warranted the availability of gas and there-

fore "assumed for itself the entire risk that future conditions would raise the cost of gas." *Id.* at 599. In contrast to the contract at hand, the Gulf Oil contract contained an explicit provision warranting availability of gas for delivery: "Seller . . . warrants and agrees that there will be provided . . . a quantity of gas sufficient to enable Seller to have available for delivery . . . a volume not less than [a certain amount]. . . ." *Id.* at 594. The 1963 water service contract explicitly and unambiguously limits the liability of the government for water shortages, without exception. The statements cited by Area I do not alter this conclusion.

D.

Even if the water service contract did obligate the government to supply, without exception, 900,000 acre-feet of water, the district court correctly held that Area I would still not be entitled to prevail as the contract is not immune from subsequently enacted statutes. 849 F.Supp. at 730. The Supreme Court has held that Congress's power to exercise sovereign authority " 'will remain intact unless surrendered in unmistakable terms.' " *Bowen v. Public Agencies Opposed to Social Sec. Entrapment,* 477 U.S. 41, 52, 106 S.Ct. 2390, 2397, 91 L.Ed.2d 35 (1986) (quoting *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 148, 102 S.Ct. 894, 907, 71 L.Ed. 2d 21 (1982)). "[C]ontractual arrangements, including those to which a sovereign itself is party, 'remain subject to subsequent legislation' by the sovereign." *Id.* (quoting *Merrion,* 455 U.S. at 147, 102 S.Ct. at 907). Nothing in the 1963 contract surrenders in "unmistakable terms" Congress's sovereign power to enact legislation. Rather, the contract was executed pursuant to the 1902 Reclamation Act and all acts amendatory or supplementary thereto. 1963 Contract Preamble. *See Madera Irr. Dist. v. Hancock,* 985 F.2d 1397, 1407 (9th Cir.) (Hall, J., concurring), *cert. denied,* —— U.S. ——, 114 S.Ct. 59, 126 L.Ed.2d 29 (1993). The contract contemplates future changes in reclamation laws in Ar-

ticle 26, and Article 11 limits the government's liability for shortages due to any causes. As Area I recognized in its oral argument, CVPIA marks a shift in reclamation law modifying the priority of water uses. There is nothing in the contract that precludes such a shift.

E.

Area I argues that Article 11 as interpreted by the district court is unenforceable on five grounds. None of these grounds is tenable.

Area I first asserts that Article 11 as interpreted is inoperative, as it would unreasonably negate the government's express warranty of availability. Our finding that no express warranty of availability exists disposes of this argument.

Area I then argues that the district court's interpretation of Article 11 would deny Westlands landowners any damages for their losses and would therefore constitute an unenforceable liquidated damages clause. As the district court concluded, however, Article 11 does not contain a liquidated damages clause. Article 11 operates such that, where, as here, a water shortage prevents the government from delivering the entire contractual amount of water, the government is excused from full performance and no breach therefore occurs.

Relying on U.C.C. Section 2-719(2), as adopted by California, Area I next maintains that the essential purpose of Article 11's remedy provision has failed and that the provision is therefore unenforceable. That section provides, "Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act." As the district court held, "[t]here is no evidence that the essential purpose of the remedy provision has failed." 849 F.Supp. at 723 n. 10. U.C.C. Section 2-719(2) " 'becomes operative when a party is deprived of its contractual remedy.

. . .'" *Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp.*, 617 F.2d 936, 941 (2nd Cir.1980) (quoting *Soo Line R.R. Co. v. Fruehauf Corp.*, 547 F.2d 1365, 1371 n. 7 (8th Cir.1977)). Here, the contractual remedy provided for in the contract is a reduction in the price paid for water deliveries. There is no evidence that Area I has been deprived of this remedy.

Nor is Article 11 unconscionable. The district court correctly found that the water service contract was the product of bargaining by sophisticated parties who foresaw that circumstances might limit the government's ability to deliver the contracted quantity of water in the future. "Where two equal bargainers . . . agree as to the appropriate remedy . . . they should be held to the terms of their bargain." *Id.* Area I has not established that there has been a cost or allocation of risk "which is overly harsh and was not justified by the circumstances under which the contract was made." *Carboni v. Arrospide*, 2 Cal.App.4th 76, 83, 2 Cal. Rptr.2d 845, 849 (1991). Area I points out that Article 11 is a "standard" provision which appeared in other water service contracts. It does not, however, assert that the government refused to bargain over this term. *See id.* at 85-86, 2 Cal. Rptr.2d at 850-51. The mere fact that a provision is standard does not render it unconscionable.

Finally, Area I claims that Article 11 is void as against the policy of the law because it would exempt the government from responsibility for willful injury to Area I landowners' property. Following the statutory mandates of ESA and CVPIA can hardly be said to be an effort to willfully injure the landowners' property.

Consequently, the unambiguous language of Article 11(a) is enforceable.

III.

Although Judge Wanger interpreted the water service contract, he declined to evaluate the merits of the Bureau's compliance with ESA and CVPIA, holding "a motion to

enforce a stipulated judgment, which joined only some of the proper defendants and wherein Movants lack procedural standing is not the appropriate means to attack the Bureau's actions." 849 F.Supp. at 733. Because the district courts are entitled to discretion in managing cases within the federal system, we review this decision for an abuse of discretion:

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. . . . Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.

Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., 342 U.S. 180, 183-84, 72 S.Ct. 219, 221, 96 L.Ed. 200 (1952).[6]

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[6] Area I contends this court should review *de novo* the district court's decision to abstain from resolving the statutory issues. For this proposition, Area I cites *Gartrell Constr. Inc. v. Aubry*, 940 F.2d 437, 441 (9th Cir.1991). This reliance is misplaced. *Gartrell* applied the abstention doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Id.* at 441. The *Younger* abstention doctrine is not at issue here, and commands a different standard of review. *Younger*, like the other established abstention doctrines, is inapplicable to this case, as those doctrines govern circumstances involving the exercise of concurrent jurisdiction by state and federal courts. As is discussed above, district courts are given deference in managing cases within the federal system.

In general, the Supreme Court has recognized the following categories of circumstances appropriate for abstention:

> Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law" [Pullman abstention]. . . .
>
> . . . where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at bar [Burford abstention]. . . .

Where the question of abstention arises among federal courts, judicial economy is a primary consideration: "As between federal district courts . . . though no precise rule has evolved, the general principle is to avoid duplicative litigation." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 96 S.Ct. 1236, 1246, 47 L.Ed.2d 483 (1976); *see Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1204 (2nd Cir.1970) ("[A] district judge has considerable latitude in these matters").

In propounding that abstention must be permitted only in "exceptional" circumstances, Area I draws from *Colorado River* abstention cases in which a federal court declines to decide a case in favor of similar litigation pending before a state court. *See, e.g., American Int'l Underwriters (Philippines), Inc. v. Continental Ins. Co.*, 843 F.2d 1253 (9th Cir.1988). Such a refusal to exercise jurisdiction is considered to be beyond the demands of federalism that are at the heart of abstention doctrine and thus it " 'can be justified . . . only in . . . exceptional circumstances.' " *Colorado River*, 424 U.S. at 813, 96 S.Ct. at 1244 (quoting *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-89, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959)); *see generally* Charles A. Wright, Law of Federal Courts § 52, at 336-37 (5th ed. 1994). In contrast to the *Colorado River* type of abstention, at issue here is the propriety of a *federal district*

. . . where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings [Younger absention].

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-16, 96 S.Ct. 1236, 1244-45, 47 L.Ed.2d 483 (1976) (citations omitted). In *Colorado River*, the Supreme Court recognized a fourth limited category of abstention to serve the convenience of the federal courts where a federal action could be dismissed in favor of a pending state action. *Id.* at 817-19, 96 S.Ct. at 1246-47. None of these types of abstention is relevant here.

court declining to decide an issue which will be decided in a parallel *federal district court* proceeding. Area I's reference to *Colorado River* abstention cases is therefore inapt.

Judge Wanger held that Area I lacked procedural standing to challenge the adequacy of the biological opinion, as the present action did not name the National Marine Fisheries Service or the Department of Commerce. And neither of these potential defendants was provided the sixty days notice of intent to file suit under ESA, as is required by 16 U.S.C. § 1540(g). Consequently, he concluded the forum was inappropriate. On the other hand, the Westlands, San Benito County, San Luis, and Panoche Water Districts had filed suit in the same court challenging the Bureau's method of compliance with ESA and CVPIA. In that case, the proper parties were named as defendants. *Westlands Water Dist. et al. v. United States et al.*, 850 F.Supp. 1388. The Westlands case is also before Judge Wanger. Judge Wanger properly determined that the Westlands case would adequately address Area I's challenge to the Bureau's water allocations and it would thus be "judicially inefficient to have two parallel cases proceeding simultaneoulsy." 849 F.Supp. at 729.[7] This inefficiency is heightened by the fact that "challenges to the Bureau's method of compliance with

[7] Indeed, since the district court's ruling, Area I has intervened in the Westlands litigation where it is presently challenging the Bureau's application of ESA and CVPIA. In particular, Area I argues the following: that the government's actions in allocating CVP water were arbitrary, capricious and/or contrary to law; that the reductions implemented in the 1993 water year were not mandated by statute; that the dedication of the 800,000 acre feet of CVP yield for fish and wildlife purposes was not mandated, was not done in compliance with, and was a violation of the CVPIA; and that the 225,000 acre feet reduction for salmon protection under ESA was not mandated, or done in compliance with, and was a violation of the ESA. *See Westlands Water Dist. v. United States*, 850 F.Supp. 1388, 1397-98 (E.D.Cal.1994) (moton to dismiss water districts' complaints).

ESA and CVPIA will undoutbedly involve extremely complex and time-consuming proceedings." *Id.*

Under the circumstances, it was within the district court's discretion to decline to evaluate the compliance issue; to do otherwise would be both inefficient and unnecessary. Moreover, such a decision will enable a comprehensive judicial resolution of the allocation problem which affects many parties other than Area I.

IV.

In conclusion, the district court correctly interpreted the water service agreement between the United States and the Westlands Water District. Article 11(a) unambiguously absolves the government from liability for its failure to deliver the full contractual amount of water where there is a shortage caused by statutory mandate. Area I's challenge to the Bureau's compliance with ESA and CVPIA will be resolved in the separate proceeding in the Westlands case.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
E.D. CALIFORNIA
FRESNO DIVISION

No. CV-F-79-106 OWW

BARCELLOS AND WOLFSEN, INC., *et al.*,
Plaintiffs,

v.

WESTLANDS WATER DISTRICT, *et al.*,
Defendants.

June 18, 1993

Order Denying Motion for Additions or Amendments to Decision Sept. 10, 1993

Motion was brought to enforce judgment and to require federal defendants to sell irrigation water to local water district. The District Court, Wanger, J., held that: (1) water service agreement between federal government, as supplier of water, and local water district did not confer any absolute contract right to unqualified delivery of irrigation water; (2) reclamation statute did not confer any broader rights upon plaintiffs than those which they possessed under agreement; and (3) limitation-of-liability clause would be interpreted to imply requirement of good faith and reasonableness on government's part.

Motion denied.

MEMORANDUM OPINION AND ORDER RE: MOTION TO ENFORCE JUDGMENT

WANGER, District Judge.

Over seventy landowners and water users ("Movants") within "Area I" of Westlands Water District, as defined in paragraph 1.14 of the stipulated judgment entered in this case in 1986 ("Judgment"), seek enforcement of the Judgment requiring Federal Defendants to sell Westlands irrigation water.[1]

I. Background

The following facts are undisputed: Westlands entered into a water service contract with the United States in 1963 under which the United States, through the Bureau of Reclamation, agreed to make available for Westlands' purchase 900,000 acre-feet of water from the San Luis Unit of the Central Valley Project ("CVP"). Movants are third party beneficiaries of the 1963 contract. Section 4.1 of the Judgment states that Westlands and the United States "shall perform the 1963 Contract." Section 3 allows any party to the Judgment to obtain relief from violation of the Judgment by filing a motion in this Court sixty days after written notice is provided all other parties. Sufficient notice was provided by Area I representatives.[2]

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[1] Paragraph 4 of the Judgment states that "[t]he parties entitled to file such a motion . . . shall be limited to the Area representatives provided for in Paragraph 22 . . ." Paragraph 22.2 lists the representatives of Area I as "Boston Ranch Company, Edwin O'Neill, Frank Orff, Y. Stephen Pilibos and Fabry Farms." In their papers, Movants assert that this motion to enforce is brought by dozens of landowners, including O'Neill, Orff, and Pilibos. Under the terms of the Judgment, the motion is properly brought only by these three individuals.

[2] Representatives of landowners and water users in Area II have filed a document captioned "Response to Motion to Enforce Judgment." The document states that the Area II representatives support the motion and requests the Court to similarly enforce their

On April 7, 1993, the Bureau announced its updated allocations of CVP water for various uses for water year 1993-94. Agricultural contractors south of the Sacramento-San Joaquin Delta, such as Westlands, are to receive 50 percent of their contractual supply of water. Other sources are to receive from 75 to 100 percent of their normal allotment. Acts taken by the Bureau in complying with the Endangered Species Act [3] (ESA) and the newly enacted Central Valley Project Improvement Act [4] (CVPIA) have significantly impacted its allocation decisions. In particular, in response to the listing by the Secretary of Commerce of the winter-run chinook salmon

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alleged rights to an additional 250,000 acre-feet of water arising from paragraph 5 of the Judgment (Movants' claim is based on paragraph 4).

Federal Defendants properly object to this request on procedural grounds, as the Area II representatives have not provided the 60-day written notice required by paragraph 3 of the Judgment. The November 1992 notice sent by Area I representatives specifically raises claims only as to water to be provided Area I under the 1963 service contract. The Area II representatives received this notice six months ago, yet have not filed notice of their claims. The Area II representatives claim that Federal Defendants are not prejudiced by the Court considering its additional claims at this time, yet they also assert that their right to the 250,000 acre-feet arises not from the 1963 Contract, but from the Judgment itself. Federal Defendants have not had the opportunity to brief these separate and new claims. Conversely, the Area II representatives state they will be affected by any ruling as to the claims raised by the Area I Movants. As resolution of the Area I Movants' claims relies primarily on interpretation of the 1963 Contract, rather than the Judgment, any adverse effect would appear minimal. In any case, the Area II representatives have brought this situation on themselves by failing to follow the procedure provided in the Judgment.

Westlands has also filed a memorandum in support of Area I's motion. It has not been considered.

[3] 16 U.S.C. § 1531 *et seq.*

[4] Pub. L. No. 102-575, 106 Stat. 4600.

and Delta smelt as threatened species,[5] operating limitations have been imposed on the pumps which bring water to users south of the Delta.

Movants argue that the 1963 contract imposes a non-alterable contractual obligation on the part of the Federal Defendants to provide no less than 900,000 acre-feet of water to Area I in water year 1993-94. They seek a declaration that Federal Defendants are required to make available for sale all 900,000 acre-feet, or in the alternative, an order 1) requiring Federal Defendants to pay an amount per acre foot necessary to procure substitute water from other sources, 2) enjoining Federal Defendants from enforcing liens or collecting assessments on Area I land, under the 1965 repayment contract, and 3) enjoining Federal Defendants from enforcing the ten-year sale restriction under deed arising from sale of excess lands in Area I.

II. Standards for Interpreting Contract Provisions

Federal common law controls the interpretation of a contract entered pursuant to federal law when the United States is a party. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir.1989). "A written contract must be read as a whole and every part interpreted with reference to the whole. Preference must be given to reasonable interpretations as opposed to those that are unreasonable, or that would make the contract illusory." *Id.*

"Extrinsic evidence is inadmissible to contradict a clear contract term. . . ." *Pierce Cty. Hotel Emp. & Rest. Emp. Health Trust v. Elks Lodge, B.P.O.E., No. 1450*, 827 F.2d 1324, 1327 (9th Cir.1987). On the other hand, "where a contract's meaning is not clear on its face, its interpretation depends upon the parties' intent at

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[5] The chinook salmon was listed as a threatened species in November of 1990. The Delta smelt was listed in March, 1993.

the time it was executed." *Arizona Laborers, Teamsters & Cement Masons Local 395 Health & Welfare Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1515 (9th Cir.1985) (quotation omitted). The basis for the rule that "extrinsic evidence [is] inadmissible to interpret, vary or add to the terms of an unambiguous written instrument" is that

> [i]f parties to an agreement could not rely on written words to express their consent to the express terms of that agreement, those words would become little more than sideshows in a circus of self-serving declaration[s] as to what the parties to the agreement really had in mind. The parole evidence rule thus enables parties to rely on written instruments as embodying a complete memorial of their agreement, and to avoid costly and disruptive litigation over the existence of oral and implied terms that may or may not have been contemplated by the parties.

Wilson Arlington Co. v. Prudential Ins. Co., 912 F.2d 366, 370 (9th Cir.1990).

"The existence of an ambiguity must be determined as a matter of law." *State Farm Mut. Auto. Ins. Co. v. Fernandez*, 767 F.2d 1299, 1301 (9th Cir.1985). "A contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Kennewick Irrigation Dist.*, 880 F.2d at 1032. " 'The fact that the parties dispute a contract's meaning does not establish that the contract is ambiguous.' " *Id.* (quoting *International Union of Bricklayers & Allied Craftsman Local No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1406 (9th Cir.1985)).

III. Discussion

Federal Defendants do not contest that the 1963 contract obligates the Bureau to provide 900,000 acre-feet of water annually. Yet they contend that the Bureau's compliance with the ESA and the CVPIA has made it

impossible to deliver Westlands' entire allocation. They also correctly note that the contract contains a provision limiting that obligation in case of shortage. Any contractual rights Area I landowners and water users have in the 900,000 acre-feet of water is limited by Article 11, which states, in pertinent part:

> (a) There may occur at times during any year *a shortage in the quantity of water available for furnishing to the District* through and by means of the Project, but *in no event shall any liability accrue against the United States* or any of its officers, agents, or employees for any damage, direct or indirect, *arising from a shortage on account of* errors in operation, drought or *any other causes*. . . .[6]
>
> (b) In the event that in any year there is delivered to the District by reason of *any shortage* or apportionment as provided in subdivision (a) of this article or any discontinuance or reduction of service as set forth in subdivision (d) of Article 9 hereof, less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account of the amounts paid to the United States by the District for water for said year in a manner similar to that provided in Article 7. To the extent of such deficiency, *such adjustment shall constitute the sole remedy of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.* (emphasis added).

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[6] The remainder of Section (a) gives the Bureau the right to apportion the available water supply among the District and "others entitled under the then existing contracts" should a shortage occur. Neither party suggests that the Bureau has invoked this right of apportionment. The language of section 11(b) makes clear that a shortage can exist without an apportionment occurring.

Under Article 11, Movants are claiming "by, under, or through the District," and are entitled to the full contractual allotment only to the extent that a shortage has not arisen due to "any cause." If they are provided less, their sole remedy is an adjustment in their payments.

The parties to the stipulated judgment recognized that this shortage provision was an integral part of the service contract. Paragraph 17.5 of the Judgment states:

> *In years of water shortage when water deliveries to Central Valley Project water contractors are reduced by the Federal Parties under their respective water service contracts*, deliveries to and within the District of water purchased under Article 3 of the 1963 Contract to which the water users in Area 1A and Area 1B have prior rights shall be proportionally reduced along with deliveries to and within the District of the additional water from the Central Valley Project to which lands in the District are entitled. (emphasis added).[7]

Movants contend that Article 11 is invalid because Federal Defendants have "expressly warranted that the water in question can and will be available, and done so repeatedly." They cite case law in which courts have denied operative effect to contract clauses which limit or negate express warranties. That is, Article 11 cannot serve to limit the government's liability because Federal Defendants expressly warranted that water would be available. Movants fail to establish the existence of such an express warranty. They cite extrinsic evidence such as statements made by President Kennedy in the groundbreaking ceremony for the San Luis Unit and a letter

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[7] Paragraph 25 of the Judgment states that the provisions of paragraph 17 apply only among the District and its intra-district entities and are not intended to benefit the United States. This does not prevent referencing the paragraph as evidence the parties recognized the existence and import of the shortage provision in the service contract.

written in September of 1960 by the Bureau's assistant regional director. The three provisions of the 1963 contract which they cite create no "warranty of availability." [8] The weakness of Movants' contention is demonstrated by the fact they cite to Article 11 itself as creating an express warranty. It does not.

Movants also object that Article 11 fails to provide minimum adequate remedies for breach and that its damage provision is unconscionable.[9] They additionally allege that Article 11 violates public policy as it exempts the government from responsibility for the willful injury of the property of another. Such arguments fail. The

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[8] Movants cite article 11(a) and the following two prefatory passages of the Act:

> WHEREAS, investigations of the District's lands and present water supply indicate that irrigated and irrigable lands within the boundaries of the District are at present in need of additional water for irrigation and certain areas have a potential need of water for irrigation, that ground water underlying the District is seriously depleted and in need of replenishment, *and that an additional water supply to meet these present and potential needs can be made available by and through the works constructed* and to be constructed by the United States. . . .
>
> WHEREAS, investigations of the streamflow in the Sacramento River, the Trinity River, the American River, the San Joaquin River, and their tributaries *indicate that there will be available for furnishing to the District from the San Luis Unit an additional water supply* for surface diversion and direct application for irrigation and directly or indirectly to replenish depleted ground waters underlying the District.

[9] Movants rely on the Uniform Commercial Code and California case law in advancing these arguments. Federal Defendants correctly note that federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir.1989). However, as the UCC is a source of federal law common law, its provisions may be relied upon in interpreting such a contract. *See Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 188 (5th Cir.), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984).

1963 contract was the result of bargaining between sophisticated parties who foresaw the possibility that any number of circumstances, known or unknown, might limit the government's ability to deliver the contracted quantity of water. The broad language of Article 11 reflects this understanding. The damage provision allows for an adjustment in the purchase price should the government be unable to meet its water delivery obligations.[10]

The contract cannot reasonably be read "to allow the government to willfully injure Movants' property." Article 11 expressly excuses the water delivery obligations in the event of shortage from any cause. In this instance the cause allegedly arises from environmental requirements and reclamation needs arising from legislation enacted after the contract. Neither the ESA nor the CVPIA by their terms evidence intent of the United States to willfully injure Movants' property.

Nor is the language of Article 11 ambiguous. The terms at issue are not defined in the contract but they are clear on their face. There is but one reasonable interpretation of the term "shortage": a lack or deficit. Webster's New Collegiate Dictionary (5th ed. 1977). It is not possible to construe "cause" to connote anything but the obvious meaning: "something that brings about an effect or result." *Id.* It is also impossible to construe the term "any" to mean anything but "one or some in-

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[10] Movants allege that the damage provision violates UCC § 2719. Section 2719(1) states that an agreement may provide for substitute remedy provisions "as by limiting the buyer's remedies to return of the goods and repayment of the price . . ." Movants argue that under § 2719(2), the government cannot enforce the limited remedy provision because its essential purpose has failed. There is no evidence that the essential purpose of the remedy provision has failed. *Cf. RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir.1985) (essential purpose of remedy provision which provided that seller would repair software failed where seller unable or unwilling to repair product). Nor is § 2719(3) applicable, as the provision cannot be considered unconscionable.

discriminately of whatever kind." *Id.* There is no need to examine extrinsic evidence as to the parties' intended meaning.

Movants complain that interpreting the provision for "shortage" due to "any other causes" in a straightforward manner places no limitations on Federal Defendants' ability to create the "cause." Westlands, as the contracting party, did not include any language of limitation in the contract. There is no legal or equitable justification for rewriting the parties' contract. *See Travelers v. Budget Rent-A-Car Systems*, 901 F.2d 765, 767-69 (9th Cir. 1990).

This is not to say that Movants cannot challenge any cause for a shortage, to show that the cause was unlawful or unreasonable under the contract. Yet, Federal Defendants allege that the shortages arise from their mandatory compliance with federal statutes. Mandatory compliance with federal statutes is neither unlawful nor unreasonable.[11]

Movants contend that the contract created vested rights which cannot be altered by subsequent legislation. In *Cisneros v. Alpine Ridge Group*, —— U.S. ——, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993), the Supreme Court reversed a Ninth Circuit decision which held that legislation passed by Congress in 1989 violated the Due Process Clause of the Fifth Amendment by stripping HUD landlords of their vested rights as created by government contracts to automatic annual rent increases. The Court found it unnecessary to reach the constitutional issue because a provision of the contract to which the Court of Appeals failed to give proper effect limited the landlords' right to receive rent increases. "Because we find that respondents have no contract right to un-

[11] Federal Defendants have not suggested that the Bureau's allocation decisions were based on its *voluntary* compliance with federal or state law, or that a shortage may be created under the contract by acts not *required* by law.

obstructed formula-based rent adjustments, we have no occasion to consider whether [the challenged legislation] unconstitutionally abrogated such a right." *Id.* at ——, 113 S.Ct. at 1905. The express language of Section 11 negates any absolute contract right in Movants to the unqualified delivery of irrigation water.[12]

Movants contend that through the incorporation of reclamation law in the 1963 contract, the obligation of the Federal Defendants to supply water is statutory in nature. Any statutory rights which Movants possess as a result of the 1963 contract can be no broader than their contractual rights. Movants implicitly concede that both types of rights are identical in scope: "[a] farmer's water right under his service, repayment and recordable contracts with the government constitute a property right appurtenant to his land."

Nor does the existence of the Judgment make Movants' rights to the water more expansive or of a different legal nature than as provided in the 1963 contract. As the Ninth Circuit stated in *Barcellos II*, "All the judgment requires is for the 1963 Contract to be performed. We have already held that [the new legislation] is not inconsistent with the 1963 Contract." 899 F.2d at 826.

As stated above, Movants may attempt to establish that the cause of shortage was unlawful or unreasonable under the contract, but Federal Defendants can rebut Movants' showing by demonstrating that the shortage was caused by the Bureau's mandatory compliance with the ESA

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[12] Movants lost a similar argument in litigation referred to as *Barcellos II*, 899 F.2d 814 (9th Cir.), *cert. denied*, 498 U.S. 998, 111 S.Ct. 555, 112 L.Ed.2d 562 (1990). Movants moved to enforce the Judgment, asserting the Judgment required the Bureau to provide CVP water for excess lands under extended recordable contracts at a subsidized price regardless of a change in federal law. The Ninth Circuit affirmed this Court's dismissal of the action by concluding that the landowners had no contractual right to receive subsidized water, and therefore, a change in law did not deprive them of any property right.

and/or the CVPIA. At oral argument, Movants confirmed that they assert three acts caused the Bureau to determine a shortage exists: 1) the Bureau's compliance with the biological opinion as to the winter-run salmon;[13] 2) planning done by the Bureau in anticipation of the requirements expected to be imposed by the Delta smelt biological opinion; and c) the Bureau's allocation of water to refuges south of the Delta under the Central Valley Project Improvement Act.

Movants make a number of legal challenges to these alleged acts. Many must be rejected as they are incorrectly premised on the Movants having an absolute right under the 1963 contract and/or reclamation law to a full allocation of water. These arguments are: 1) the government owes mandatory duties to sell and deliver to Area I the water in question under reclamation law; 2) when contradictory mandatory duties are created under reclamation law and the Endangered Species Act, reclamation law controls; 3) the ESA and CVPIA are unconstitutional as applied as they violate Area I's contract rights under the due process clause; and 4) the ESA and CVPIA are unconstitutional as applied as they violate rights created by the Judgment under the separation of powers doctrine.

Movants additionally allege that Section 3408(k) of the CVPIA forbids the use of water for wildlife refuges to the extent it infringes on the Movants' prior rights to its use.[14] Section 3406(d) requires the Bureau to provide

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[13] The National Marine Fisheries Service issued a Biological Opinion on February 12, 1993, as to the Winter-Run Chinook Salmon. The Opinion states that jeopardy to the species can be avoided by the Bureau operating its Delta pumps in a specified manner. The operational criteria outlined in the Opinion limits the Bureau's ability to pump water to areas south of the Delta.

[14] In its briefs, the government states 250,000 acre-feet of water have been allocated for delivery to "federal wildlife refuges and state wildlife management areas as required by Section 3406(d) of CVPIA."

water to the refuges. Section 3408(k) provides in part, "nothing in this title is intended to alter the terms of any final judicial decree confirming or determining water rights." Movants additionally cite legislative history in which Senator Malcolm Wallop stated that he had been successful in obtaining "protection of all court decrees, including the *Barcellos* decree involving Westlands . . ." 138 Cong.Rec. S17659, S17660 (October 8, 1992).

Under the Judgment, which mandates enforcement of the 1963 contract, Westlands' water rights are limited by the shortage provision contained in Article 11. No impairment of the Barcellos judgment occurs, as the 1983 contract is being performed in accordance with its terms. Section 3406(d) requires the Bureau to provide water to wildlife refuges. The result of compliance with section 3406(d) is a shortage in water to deliver to satisfy the Bureau's contractual obligations to Westlands.

Movants further contend that the Bureau cannot make allocation decisions based on restrictions, which it believes will be imposed under the unissued Delta smelt biological opinion. This issue is moot as the biological opinion was issued on May 28, 1993. In any case, 16 U.S.C. § 1536 (a)(2) requires the Bureau to "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any . . . threatened species. . . ." Movants provide no authority that suggests that this obligation is suspended pending issuance of a biological opinion.

Two of Movants' arguments remain: 1) the Bureau must complete an Environmental Impact Statement prior to complying with the CVPIA and the biological opinions; and 2) the biological opinion issued as to the winter-run chinook salmon is inadequate.[15]

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[15] Movants allege the National Marine Fisheries Service, an agency of the Department of Commerce, violated the ESA by failing to use the best scientific and commercial data available in

These remaining arguments concern the Bureau's *method* of compliance with the ESA and the CVPIA, rather than the *necessity* of the Bureau's compliance. In *Alpine Ridge*, the Supreme Court stated, "If respondents have been denied formula-based rent increases based on shoddy comparisons, *their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons.*" —— U.S. at ——, 113 S.Ct. at 1904. The proper forum to raise Movants' remaining issues is a separate suit in which all the necessary parties are named, rather than a motion to enforce the 1986 Judgment. Movants lack procedural standing to challenge the adequacy of the biological opinion, as the present action does not name the National Marine Fisheries Service or the Department of Commerce, nor have the Fisheries Service or the Department of Commerce been provided sixty days notice of Movants' intent to file suit under ESA, as required by 16 U.S.C. § 1540(g).

On May 17, 1993, Westlands filed suit alleging the biological opinion is inadequate and an EIS is required.[16] The Bureau, the National Marine Fisheries Service, and the Secretaries of Commerce and Interior are named as defendants. Proper notice appears to have been provided. While Westlands and its member landowners and water users may have differing interests as to how water is divided within the water district, their interests in obtaining water from the Bureau under the 1963 service contract appear to be identical.[17] No request has been made for consolidation of the Westlands' case with this action.

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determining the causes of the "jeopardy" facing the species, *i.e.*, the causes of its threatened status, and did not provide a summary of information detailing how water deliveries affect the winter run of the salmon.

[16] Case number CV-F-93-5327-OWW-SSH ("Westlands' case").

[17] If this is not the case, Area I may attempt to intervene in the Westlands litigation.

IV. Conclusion

The Motion To Enforce Judgment is DENIED, without prejudice, pending the outcome of the Westlands' case. Should Westlands succeed these, the Movants may renew their motion, and attempt to demonstrate that the Bureau acted in an unreasonable manner, not contemplated by the parties to the 1963 contract in curtailing their allotment of water.

SO ORDERED.

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR ADDITIONAL AND AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On June 18, 1993, the Court issued a memorandum opinion and order denying a motion brought by landowners and water users within "Area I" of Westlands Water District ("Movants") to enforce the 1986 stipulated judgment in a manner which would require Federal Defendants to sell irrigation water to Westlands. On July 8, 1993, Movants filed the present motion, captioned "Motion for Additional and Amended Findings of Fact and Conclusions of Law." Movants allege that the motion is brought pursuant to Fed.R.Civ.P. 52(b), 59(a), 60(b) and Local Rule 230(k).

Movants provide 16 specific statements which they allege are "new and additional findings of fact and conclusions of law based on evidence adduced and arguments made in the prior motion proceeding, but not addressed" in the memorandum opinion:

> (1) The words "no . . . liability . . . for . . . damage" in Article 11 of the 1963 Contract mean only no liability for money damages;
>
> (2) The phrase "quantity of water available" in Article 11 means the quantity of water which is physically accessible prior to allocation for environmntal uses;
>
> (3) The government has an obligation under reclamation statutes, which is incorporated into the 1963 Contract, to recognize Movants' right to the beneficial use of the diverted water;
>
> (4) Article 11, properly interpreted, neither negates nor limits said obligation;
>
> (5) The government has an obligation under Article 3(f) of the 1963 Contract not to disturb Movants' right to the beneficial use of said water;

(6) Article 11, properly interpreted, neither negates nor limits said obligation;

(7) The government has an obligation under reclamation statutes, which is incorporated into the 1963 Contract, to give priority to irrigation uses over nonirrigation uses;

(8) Article 11, properly interpreted, neither negates nor limits said obligation;

(9) The government has an obligation under reclamation statutes, which is incorporated into the 1963 Contract, not to donate said water without receiving payment therefor;

(10) Article 11, properly interpreted, neither negates nor limits said obligation;

(11) Article 11, as interpreted by the government; unreasonably negates the government's express warranty that said water would be available to Movants and is, therefore, inoperative;

(12) Article 11, as interpreted by the government, is unenforceable, because it is unreasonable to fix Movants' liquidated damages for said diversion at zero dollars;

(13) The government's statutory obligations to recognize Movants' right to the beneficial use of said water, to give priority to irrigation over nonirrigation uses, and not to donate said water free of charge are mandatory obligations;

(14) Diverting said water in violation of said reclamation statutes is neither mandated nor permitted under the Endangered Species Act ("ESA"), nor the Central Valley Project Improvement Act ("CVPIA");

(15) The government must reconcile its obligations under said reclamation statutes with any con-

flicting obligations under ESA or CVPIA by fulfilling its obligations under said reclamation statutes; and

(16) Diverting said water was not done in compliance with either ESA nor CVPIA.

Movants additionally "seek the following amendments to findings of fact and conclusions of law set forth in the" memorandum opinion:

(17) The words "any other causes" in Article 11 exclude the government's diversion of said water;

(18) The government made an express warranty that said water would be made available to Movants;

(19) Article 11, as interpreted by the government, is unenforceable because circumstances cause it to fail of its essential purpose;

(20) Article 11, as interpreted by the government, is unenforceable, because it is unconscionable;

(21) Article 11, as interpreted by the government, is unenforceable because it exempts the government from responsibility for its own willful injury to Movants' property; and

(22) Article 11, as interpreted by the government, does not negate nor limit the government's obligations to Movants under said reclamation statutes.

I. Jurisdiction

Federal Defendants raise three challenges to the Court's jurisdiction to hear the motion.

A. *Timeliness of Motion*

Federal Defendants contend that the motion was not timely filed. Rule 59(b) provides: "A motion for a new trial shall be served not later than 10 days after the entry

of judgment." Rule 52(b) contains an identical limitation period. In their papers, both parties have implicitly assumed that the court's memorandum opinion and order was the equivalent of a final judgment (Movants have also filed an appeal based on the opinion). Thus, both parties have assumed the 10-day rule is applicable here.

It is unnecessary to analyze that assumption, as the motion is timely in any case. The opinion and order was signed and filed on June 18, 1993, but the Court's records indicate the Clerk did not enter it onto the docket until June 22, 1993. Both Rules 52(b) and 59(b) state that the time for motions runs from "*entry* of judgment." Rule 6(a) provides that the first day of the time period is not counted, nor, in cases where the time allowed is less than 11 days, are weekends or holidays. Rule 59(b) provides that the motion must merely be served, not filed, within 10 days. The certificate of service attached to the motion indicates the motion was served on July 7, 1993, the final day of the time period.

At the hearing, Movants requested that the Court also consider the motion as made under F.R.C.P. Rule 60(b). Rule 60(b) motions need not be brought within 10 days of entry of judgment.

B. *Effect of Appeal*

Federal defendants' letter of August 20, 1993, questioned whether the district court was divested of jurisdiction to consider this motion by Movants' August 17, 1993, notice of appeal from the Court's order. Fed.R.App.P. 4(a)(4) states:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party; (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be granted if the motion is granted; (iii) under Rule

> 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. *A notice of appeal filed before the disposition of any of the above motions shall have no effect. . . .*

As Movants' motion was timely filed pursuant to Rules 52(b) and 59(b), the appeal was premature and does not divest this Court of jurisdiction.

C. *Grounds for the Motion*

Federal Defendants contend that the present motion, while based on 52(b) and 59(a), is more properly termed a motion to reconsider. As with a motion for summary judgment, resolution of the underlying motion required application of legal principles to facts which were not in dispute.[1] Movants contend that the Court did not fully consider their arguments and/or erred in applying the law. Movants concede that they seek reconsideration by seeking relief under Rule 60(b) and Local Rule 230(k).[2]

In the absence of an allegation of a change in the law or the existence of new evidence, reconsideration is proper only "to correct a clear error or prevent manifest injustice." *Kern-Tulare Water District v. City of Bakersfield*, 634 F.Supp. 656, 665 (E.D.Cal.1986), *aff'd in part and rev'd in part on other grounds*, 828 F.2d 514 (9th Cir.1987), *cert. denied*, 486 U.S. 1015, 108 S.Ct.

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[1] For instance, it was determined that no express warranty of availability was created on the facts as presented by the Movants and not disputed by Federal Defendants.

[2] Captioned "Applications for Reconsideration," Rule 230(k) applies "[w]henever any motion has been granted or denied in whole or part, and a subsequent motion for reconsideration is made."

Movants have not alleged that the motion is brought pursuant to Rule 59(e).

1752, 100 L.Ed.2d 214 (1988). A finding of "extraordinary circumstances" is required to grant relief under Rule 60(b)(6). *Backlund v. Barnhart,* 778 F.2d 1386, 1388 (9th Cir.1985). Thus while the Court has jurisdiction to hear the motion, relief may be granted to Movants only upon a showing of extraordinary circumstances, a clear error of law, or manifest injustice.

II. Discussion

A. *Availability of Injunctive Relief*

Movants assert that the Court failed to consider their rights to injunctive relief. They assert that because subsection (a) of Article 11 states that ". . . in no event shall any liability accrue against the United States . . . for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought or any other cause," Article 11 "merely limit[s] the government's liability for money damages but [has] no further effect, including any effect on any equitable remedy."

Movants ignore subsection (b) of Article 11, which states, in part, that "an adjustment on account of the amount paid to the United States . . . shall constitute the *sole remedy* of the District or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply. . . ." The memorandum opinion emphasizes the pertinent language in both subsections and concludes:

> Under Article 11, Movants are claiming "by, under, or through the District," and are entitled to the full contractual allotment only to the extent that a shortage has not arisen due to "any cause." If they are provided less, their sole remedy is an adjustment in their payments.

Opinion at 722. In using the phrase "sole remedy," the parties did not differentiate between money damages and any equitable remedy.

Movants provide no authority why the contract that limits remedies as specified in Article 11(b) should not be given effect.

B. *Interpretation of the Term "Available"*

Subsection (a) of Article 11 states, in part:

> There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States or any of its officers, agents, or employees for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought or any other causes. . . .

Movants allege that the phrase "quantity of water available" refers to the quantity of water *physically accessible before allocation to various users.* That is, if there is at least 900,000 acre-feet of water somewhere, there is available water and no shortage exists. This interpretation is directly affected by the entire phrase: "the quantity of water available *for furnishing to the District through and by means of the Project . . .*" Article 1(b) defines "Project" as the Central Valley Project. The plain language of the contract specifies that the parties contemplated that availability was not to be determined prior to allocation to all users by the phrase ". . . at times during any year . . ." This language means that the determination of available water is one that continues during the year.

Evaluation of water supply for shortages is ongoing from the start to the end of a year. All causes that reduce or increase available water "through the Central Valley Project" are to be considered on a continuing basis. A view that freezes the quantification of available water at a single point in time is inconsistent with this language and the history by which shortages have been determined in the past. The memorandum opinion

holds that the contract cannot be read so broadly as to allow Federal Defendants to employ unlawful or unreasonable "causes" to create a shortage. Opinion at 725. "Yet, Federal Defendants allege that the shortages arise from their mandatory compliance with federal statutes. Mandatory compliance with federal statutes is neither unlawful nor unreasonable." *Id.* Movants remain free to attempt to establish that the Federal Defendants' action in complying with federal statutes is unlawful or unreasonable. *Id.* at 724-725.

The existence of a shortage and the lack of available water are two sides of the same coin. In the same manner that Movants may attempt to prove that the shortage was illegally caused or arbitrarily and capriciously contrived, they may attempt to prove that Federal Defendants have illegally or arbitrarily withheld the amount of available water. Movants are free to challenge whether the Bureau's water allocation is mandated by law and the substantive and procedural validity of water allocations under that law, as applied. The shortage provisions in the contract bar the assertion that the Bureau's failure, at any time during a year, to deliver 900,000 acre-feet of water is, in and of itself, a breach.

C. *Whether Compliance with Newly Enacted Law Creates a Shortage from Any Cause*

Movants summarize the memorandum opinion to hold "that the words 'any' and 'cause,' as used in Article 11, are 'clear on their face,' and that the Court will not rewrite the 1963 Contract to place 'limitations on Federal Defendants' ability to create the cause.' " By taking the language of the opinion out of context, Movants misinterpret its holding. The opinion expressly states that the Bureau is *not* free to create any cause for a shortage. Movants may challenge the allocation of water on grounds that the shortage was created by arbitrary and capricious or illegal causes. Westlands and the United

States, both sophisticated parties, chose to use a broad phrase—"shortage on acocunt of . . . any other causes." Mandatory compliance with valid federal law meets the definition of "other cause."

Movants cite a 1954 Alabama district court case, *Gulf, Mobile & Ohio Railroad Co. v. Illinois Central Railroad Co.*, 128 F.Supp. 311, 324 (N.D.Ala.1954), for the proposition that "implied in every contract is one's obligation not 'to take advantage of an obstacle to performance which he has created or which lies within his power to remove.'" While this is undoubtedly true Movants have not established that the Federal Defendants have created an obstacle to their performance or have the ability to remove such an obstacle. Congress has mandated the use of Project water for environmental purposes.

Movants' motion was denied without prejudice so that they may attempt to make such a showing upon resolution of the suit filed by Westlands Water District.[a] The opinion states both that Area I may seek to intervene in that case, but that no request has been made for consolidation of the two cases. It is judicially inefficient to have two parallel cases proceeding simultaneously.

Movants further argued that 1) Article 11 was ambiguous and/or inapplicable and 2) that a government contract cannot be modified by subsequent legislation. In the memorandum opinion Article 11 was held to be both applicable and unambiguous. The second issue was not discussed, following the direction of the recent Supreme Court case, *Cisneros v. Alpine Ridge Group*, —— U.S. ——, 113 S.Ct. 1898, 123 L.Ed.2d 572 (1993), which criticized the Ninth Circuit for analyzing the identical issue, when a plain reading of a government contract made it clear that even without the subsequent legislation, no contract right existed.

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[a] CV-F-93-5327-OWW-SSH.

Assuming, *arguendo*, that Article 11 by its plain language is not controlling and the 1963 Contract obligates Federal Defendants to supply, without excuse, 900,000 acre-feet of water, Movants' argument is still based on the erroneous belief that Congress may never enact laws that have the direct or indirect effect of modifying existing contracts. Movants incorrectly contend that this modification effects a taking and violation of their due process rights.

The Supreme Court outlined the relationship between commercial contracts and subsequent legislation in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986):

> While the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights, we have declind in the context of commercial contracts to find that a "sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in" the contract. Rather, we have emphasized that "[w]ithout regard to its source, sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain intact *unless surrendered in unmistakable terms.*" . . . Therefore, contractual arrangements, including those to which a sovereign itself is party, "remain subject to subsequent legislation by the sovereign."

477 U.S. at 52, 106 S.Ct. at 2396-97. (citations omitted, emphasis added).

The Ninth Circuit has applied *Bowen* in cases in which water districts have complained that their service contracts have been impacted by subsequent federal enactments. In *Peterson v. United States Dept. of the Interior*,

899 F.2d 799 (9th Cir.1990), the court determined that neither the due process or taking clauses prevented Congress from enacting legislation limiting the volume of subsidized water that water districts can deliver to leased lands under their pre-existing contracts with the Bureau. The court found that the water contracts created no constitutionally protected property interest in the continued delivery of water. "[B]ecause the water districts have no vested property right to buy reclamation water for delivery to leased land, the restrictions imposed by [the new statute] do 'not effect a taking within the meaning of the Fifth Amendment.' For the same reason, the Water Districts' due process claim also must fail." *Id.* at 813.

Peterson found that no vested property right existed by examining the service contracts. *Id.* at 812. A vested property right would have existed only if the contract contained evidence that "Congress surrendered in clear and absolute language its right to impose express limitations on the size of leased tracts that could receive reclamation water." *Id.* at 808-09. The court alternatively concluded that "[o]ur rejection of the Water Districts' claim to a vested contract right finds further support in the Supreme Court's decision in *Public Agencies*. . . . If anything, California had a greater claim to a vested right in *Public Agencies* than do the Water Agencies in this case because in *Public Agencies* the federal government had incorporated in an agreement with the states, an express promise that those entities could withdraw from the social security system. Nonetheless, the Court held that the contracts created no interests that were entitled to protection under the taking clause of the fifth amendment." *Id.* at 811.

A reading of the 1963 Contract reveals no language or intent that "Congress surrendered in clear and absolute language its right" to adjust the amount of water supplied under the contract. To the contrary, Article 11 specifically allows such adjustments when shortages occur.

D. *Movants' Statutory Rights to Beneficial Use of the Water*

Movants assert they have statutory vested property rights in the water, which cannot be abridged. They contend that these rights arise from reclamation statutes incorporated in the 1963 Contract. The opinion concluded:

> Movants contend that through the incorporation of reclamation law in the 1963 contract, the obligation of the Federal Defendants to supply water is statutory in nature. Any statutory rights which Movants possess as a result of the 1963 contract can be no broader than their contractual rights. Movants implicitly concede that both types of rights are identical in scope: "[a] farmer's water right under his service, repayment and recordable contracts with the government constitute a property right appurtenant to his land."

Opinion at 724. Movants now reassert the proposition that by means of the incorporation of reclamation statutes into the contract, they have acquired a property right in the water greater than their contractual right. Thus, they contend even if the shortage provision in Article 11 limits their contractual rights to the water, they have a statutory right to the water with which the Bureau cannot interfere.

Movants focus specifically on 43 U.S.C. § 372, which provides:

> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.[4]

Movants cite three cases, *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir.), *cert. denied*,

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[4] *See also* 43 U.S.C. § 485h-4.

464 U.S. 863, 104 S.Ct. 193, 78 L.Ed.2d 170 (1983); *Nevada v. United States*, 463 U.S. 110, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983); and *Ickes v. Fox*, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937), for the proposition that § 372 is applicable here. Of the three, *Ickes v. Fox* is closest to our case. *Ickes* stands for the proposition that under federal reclamation law, particularly section 372, a landholder who has entered into a contract for delivery of irrigation water and has applied it to a beneficial use has a statutory property right which cannot be unilaterally altered or taken away by the government. In *Ickes*, the landowners complied with all terms of the contract, but the federal government impermissibly threatened to cut their allocation. *See also Nevada v. United States*, 463 U.S. at 126, 103 S.Ct. at 2916 ("[T]he government is completely mistaken if it believes that the water rights confirmed to it . . . were like so many bushels of wheat, to be bartered, sold, or shifted about as the Government might see fit.").

Yet, *Ickes* does not stand for the proposition that these property rights require the government to continue to deliver water in contravention of the water delivery contract, which defines the extent of the water right. The disputed contract grants specified water rights. The government is prohibited from breaching the terms of the contract. Treatises are clear on this point:

> The United States, of course, is compelled by *Ickes* only to fulfill its contracts. Thus, in *Fremont-Madison Irrig. Dist. v. United States Dep't of the Interior*, 763 F.2d 1084 (9th Cir.1985), the United States prevailed in a case involving its failure to deliver water. The water supply contract provided there would be no liability for water shortages resulting from the failure of facilities. When the Teton Dam broke, the irrigation district had no protectable property right to a continued water supply.

4 *Water and Water Rights*, (R. Beck, ed.) § 41.05(a) at 411 n. 214 (1991). In *Fremont-Madison*, an irriga-

tion district argued that it had acquired a vested right to beneficial use of the water under federal law and state propetry law. The court rejected an argument analogous to that made by the Movants:

> Whatever the merits of this argument, we note that the [irrigation district] has only argued one side of the coin, *i.e.*, under Idaho law [as made applicable under federal law], "[t]he word property . . . signifies all valuable rights or interests *which are protected by law.*" [citation omitted, emphasis in original]. The so-called "hold-harmless" clause of paragraph 33 of the 1969 contract states that "[n]o liability shall accrue against [the government] for . . . shortages in the quantity of water . . . resulting from the failure of facilities of the . . . storage system. . . ." In light of this clause, it is unclear just how the rights and interests claimed by the [irrigation district] would be protected by law. Absent such protection, they cannot rise to the level of "property" under the law of Idaho. *The [irrigation district]'s argument that [the federal statute] somehow unilaterally abrogated paragraph 33 of the 1969 contract is without merit.*

763 F.2d at 1088. Movants' argument that § 372 unilaterally abrogates the shortage provision of the present contract is meritless.

Even assuming, *arguendo*, that the Movants hold water rights based on statutes which are broader than their contractual rights, they are not exempt from compliance with environmental statutes. "The [Endangered Species Act] provides no exemption from compliance to persons possessing state water rights, and thus [the water district]'s state water rights do not provide it with a special privilege to ignore the Endangered Species Act." *United States v. Glenn-Colusa Irr. Dist.*, 788 F.Supp. 1126, 1134 (E.D.Cal.1992). If Congress has directed that the Bureau reserve water for environmental purposes, Movants can-

not be heard to insist that their rights require the Bureau to disobey the law.[5]

E. *Federal Defendants' Contractual Duty Not to Disturb Movants' Right to the Beneficial Use of Water*

Movants claim that their right to the beneficial use of the water is also contractual. Article 3(f) establishes such a contractual right, but it is subject to the remainder of the terms of the contract, including the shortage provisions:

> The right to the beneficial use of water furnished to the District *pursuant to the terms of this contract* and any renewal hereof shall not be disturbed so long as the District shall fulfill all of its obligations under this contract and any such renewal.

(emphasis added). Article 3(f) creates no greater right to water than under the contract, which is limited by Article 11.

F. *Enforceability of Article 11*

Movants reallege their claims that if the shortage provision is interpreted in the manner adopted by the Court, Article 11 is invalid.[6] The memorandum opinion stated:

> Movants also object that Article 11 fails to provide minimum adequate remedies for breach and that its

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[5] Movants additionally allege, under the contract and reclamation law, that Defendants owe a duty to honor irrigation uses of the water over nonirrigation uses, along with a duty to sell the water to repay the costs of the project. Any such duties owed by the Federal Defendants are limited by the contract's shortage provision.

[6] Without providing a basis for reconsideration, Movants also reallege that Federal Defendants breached an express warranty of availability. This issue was fully discussed in the memorandum opinion at pages 722-723.

damage provision is unconscionable.[7] They additionally allege that Article 11 violates public policy as it exempts the government from responsibility for the willful injury of the property of another. Such arguments fail. The 1963 contract was the result of bargaining between sophisticated parties who foresaw the possibility that any number of circumstances, known or unknown, might limit the government's ability to deliver the contracted quantity of water. The broad language of Article 11 reflects this understanding. The damage provision allows for an adjustment in the purchase price should the government be unable to meet its water delivery obligations.[8]

The contract cannot reasonably be read "to allow the government to willfully injure Movants' property." Article 11 expressly excuses the water de-

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[7] Movants rely on the Uniform Commercial Code and California case law in advancing these arguments. Federal Defendants correctly note that federal law controls the interpretation of a contract entered pursuant to federal law when the United States is a party. *Kennewick Irrigation Dist. v. United States*, 880 F.2d 1018, 1032 (9th Cir.1989). However, as the UCC is a source of federal law common law, its provisions may be relied upon in interpreting such a contract. *See Clem Perrin Marine Towing, Inc. v. Panama Canal Co.*, 730 F.2d 186, 188 (5th Cir.), *cert. denied*, 469 U.S. 1037, 105 S.Ct. 515, 83 L.Ed.2d 405 (1984).

[8] Movants allege that the damage provision violates UCC § 2719. Section 2719(1) states that an agreement may provide for substitute remedy provisions "as by limiting the buyer's remedies to return of the goods and repayment of the price . . ." Movants argue that under § 2719(2), the government cannot enforce the limited remedy provision because its essential purpose has failed. That allegedly lawful, statutorily mandated use of Project water has occurred does not result in failure of the essential purpose of the remedy provision. *Cf. RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir.1985) (essential purpose of remedy provision which provided that seller would repair software failed where seller unable or unwilling to repair product). Nor is § 2719(3) applicable, as the provision cannot be considered unconscionable.

> livery obligations in the event of shortage from any cause. In this instance the cause allegedly arises from environmental requirements and reclamation needs arising from legislation enacted after the contract. Neither the ESA nor the CVPIA by their terms evidence intent of the United States to willfully injure Movants' property.

Paragraph 11 creates a condition precedent. Nine hundred thousand (900,000) acre-feet must be delivered annually unless a shortage exists. Movants assert that the condition is illusory because the express language of the contract does not enumerate the causes of shortage. "One of the methods of circumventing the illusory promise problem is interpolating into an agreement that otherwise seems illusory the requirement of good faith or reasonableness. A good illustration of this approach is found in the case of *Furrer v. International Health Assurance Co.*, [256 Or. 429, 474 P.2d 759 (1970)] where a promise 'to spend as he personally sees fit in developing' a business was not held to be illusory under the modern approach. There are now many cases that have employed this technique." John. D. Calamari and Joseph M. Perillo, *The Law of Contracts*, § 4-12 at 228 (1991). (*See also* § 4-12(5) discussing common practice of grafting a best efforts requirement onto sales of real estate contingent upon the purchaser's ability to obtain a specified mortgage loan.) Here, a requirement of reasonableness has been interpolated into the government's promise to deliver the full allotment of water unless shortage lawfully occurs.

Movants allege that Article 11 is unenforceable as it fixes liquidated damages at zero. The concept of liquidated damages implies the existences of a breach. Article 11 excuses performance upon the occurrence of a condition. Article 11 specifies a limitation on remedies in the event of the occurrence of the condition of a shortage. The effect of Article 11 is that if a shortage occurs, Movants are not entitled to damages because no breach

occurs. If the government refuses to deliver water in the absence of a shortage, Movants are not precluded from seeking damages.

G. *Mandatory Nature of Federal Defendants' Allocation of Water for Environmental Purposes*

Movants argue that the Federal Defendants were not required by the Endangered Species Act and the Central Valley Project Improvement Act to make water allocations for environmental purposes. Congress has mandated both expressly and implicitly that the Bureau make water allocations for environmental concerns. *See, e.g.*, CVPIA at § 3406(d) (requiring water allocations to wildlife refuges); 16 U.S.C. § 1536(a)(2) (requiring federal agencies to "insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any . . . threatened species. . . .").

The validity of allegedly applicable environmental statutes is challenged, as well as whether the Bureau has *correctly* complied with the environmental statutes. As stated in the memorandum opinion, a motion to enforce a stipulated judgment, which joined only some of the proper defendants and wherein Movants lack procedural standing is not the appropriate means to attack the Bureau's actions:

> These remaining arguments concern the Bureau's *method* of compliance with the ESA and the CVPIA, rather than the *necessity* of the Bureau's compliance. In *Alpine Ridge*, the Supreme Court stated, "If respondents have been denied formula-based rent increases based on shoddy comparisons, *their remedy is to challenge the particular study, not to deny HUD's authority to make comparisons.*" —— U.S. at ——, 113 S.Ct. at 1904. The proper forum to raise Movants' remaining issues is a separate suit in which all the necessary parties are named, rather than a motion to enforce the 1986 Judgment. Movants lack

procedural standing to challenge the adequacy of the biological opinion, as the present action does not name the National Marine Fisheries Service or the Department of Commerce, nor have the Fisheries Service or the Department of Commerce been provided sixty days notice of Movants' intent to file suit under ESA, as required by 16 U.S.C. § 1540(g).

On May 17, 1993, Westlands filed suit alleging the biological opinion is inadequate and an EIS is required.[9] The Bureau, the National Marine Fisheries Service, and the Secretaries of Commerce and Interior are named as defendants. Proper notice appears to have been provided. While Westlands and its member landowners and water users may have differing interests as to how water is divided within the water district, their interests in obtaining water from the Bureau under the 1963 service contract appear to be identical.[10] No request has been made for consolidation of the Westlands' case with this action.

Any challenges to the Bureau's method of compliance with ESA and CVPIA will undoubtedly involve extremely complex and time-consuming proceedings. Judicial economy is not served by proceeding in separate cases brought by parties with seemingly identical interests.

III. Conclusions

Movants have not demonstrated the existence of extraordinary circumstances, clear error of law, or manifest injusice which would mandate reconsideration of the order denying the motion to enforce the judgment.

Movants' motion is DENIED.

SO ORDERED.

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[9] Case number CV-F-93-5327-OWW-SSH ("Westlands' case").

[10] If this is not the case, Area I may attempt to intervene in the Westlands litigation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-17154

D.C. No. CV-F-79 106 OWW

EDWIN R. O'NEILL, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

ORDER

[Filed Jun. 8, 1995]

Before: CHOY, FARRIS and BRUNETTI, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
NOV 9 1995

(2)

No. 95-422

In the Supreme Court of the United States

OCTOBER TERM, 1995

EDWIN R. O'NEILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion by abstaining from resolving certain issues that are currently being litigated before that court in another pending suit in which petitioners have intervened.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	9
Conclusion	13

TABLE OF AUTHORITIES

Cases:

Adam v. *Jacobs*, 950 F.2d 89 (2d Cir. 1991)	12
Delta Air Lines, Inc. v. *August*, 450 U.S. 346 (1981)	9
Dugan v. *Rank*, 372 U.S. 609 (1963)	2
Ivanhoe Irrigation District v. *McCracken*, 357 U.S. 275 (1958)	2
Kerotest Mfg. Co. v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952)	11
United States v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950)	2
United States v. Montalvo-Murillo, *495 U.S. 711 (1990)*	10
Westlands Water Dist. v. *Firebaugh Canal*, 10 F.3d 667 (9th Cir. 1993)	2
Westlands Water Dist. v. *Natural Resources Defense Council, Inc.*, 43 F.3d 457 (9th Cir. 1994)	8
Westlands Water Dist. v. *United States Dep't of Interior*, 850 F. Supp. 1388 (E.D. Cal. 1994)	8, 9

Statutes and regulations:

Central Valley Project Improvement Act, Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4706-4731	6
Section 3402(f), 106 Stat. 4706	6
Section 3406(a), 106 Stat. 4714	6
Section 3406(b)(2), 106 Stat. 4715	6
Section 3406(b)(2)(C), 106 Stat. 4716	6
Endangered Species Act, 16 U.S.C. 1531 *et seq.*	4

Statutes and regulations—Continued: Page

Section 7(a)(2), 16 U.S.C. 1536(a)(2) 4
Section 7(b), 16 U.S.C. 1536(b) 4
Section 7(c), 16 U.S.C. 1536(c) 4
43 U.S.C. 371 *et seq.* 2
50 C.F.R. 402.02 5
50 C.F.R. 402.14(h) 5

Miscellaneous:

55 Fed. Reg. 46,515 5
58 Fed. Reg. 12,854 5

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 50 F.3d 677. The memorandum opinions and orders of the district court (Pet. App. 23a-37a, 38a-56a) are reported at 849 F. Supp. 717.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1995. A petition for rehearing was denied on June 8, 1995. Pet. App. 57a. The petition for a writ of certiorari was filed on September 6, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States and the Westlands Water District have entered into a water service contract under the federal reclamation laws to provide delivery of water to farmers, including petitioners. Petitioners initiated this action to enforce a 1986 stipulated judgment that required the United States to perform the contract. The district court resolved certain matters in favor of the government and abstained on other issues that are being litigated in another case pending before the same district judge. The court of appeals upheld the district court's rulings.

1. The Department of the Interior's Bureau of Reclamation operates facilities that store and deliver water for irrigation and other purposes in accordance with federal reclamation laws. See 43 U.S.C. 371 *et seq.* Those facilities include the Central Valley Project (CVP), which is situated in California and is the Nation's largest federal reclamation project. This Court's past decisions describe the essential features and operations of the CVP. See *Dugan* v. *Rank*, 372 U.S. 609, 611-614 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-287 (1958); *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950).

Of relevance here, the Bureau uses Shasta Dam and related CVP facilities in the northern Central Valley to store waters of the Sacramento, Trinity, and American Rivers. The Bureau releases those waters, when needed, into the Sacramento River, which flows south to the Sacramento-San Joaquin Delta. The Tracy Pumping Plant diverts some of the Delta water into the northern terminus of the Delta-Mendota Canal, from whence it travels to the San Luis Reser-

voir and the San Luis Canal, and then to the Westlands Water District. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993).

2. On June 5, 1963, the United States and the Westlands Water District entered into a water service contract providing that each year "the United States agreed to furnish, and the District agreed to pay for," delivery of 900,000 acre-feet of water for use on the District's eligible lands. See Pet. App. 3a. That obligation, however, is qualified by Article 11, which is captioned "UNITED STATES NOT LIABLE FOR WATER SHORTAGE." See Pet. App. 7a-8a. Article 11(a) states in part as follows:

> There may occur at times during any year a shortage in the quantity of water available for furnishing to the District through and by means of the Project, but in no event shall any liability accrue against the United States * * * for any damage, direct or indirect, arising from a shortage on account of errors in operation, drought, or any other causes.

Ibid. Article 11(b) provides in part that

> [i]n the event that in any year there is delivered to the District by reason of any shortage * * * less than the quantity of water which the District otherwise would be entitled to receive, there shall be made an adjustment on account to the amounts paid to the United States by the District for water for said year

in a manner similar to that described in another article of the contract. Article 11(b) further provides:

> To the extent of such deficiency, such adjustment shall constitute the sole remedy of the Dis-

> trict or anyone having or claiming to have by, through, or under the District the right to the use of any of the water supply provided for herein.

Ibid.

The Westlands Water District, the United States, and others later engaged in litigation concerning the contract and related matters. The parties ultimately agreed upon a stipulated judgment, which was entered by the district court in 1986. Pet. App. 4a. The 1986 judgment states that "the District and the United States shall perform the 1963 Contract" and additionally provides that "[a] party may obtain relief from a violation of this Judgment only by (a) the filing of a new action, or (b) the filing of a motion in these present actions," but that, with certain exceptions, such "proceedings against the Federal parties shall * * * be for the sole purpose of seeking an order directing the Federal parties to perform in accordance with the express terms of this Judgment." E.R. Tab 2, at 10-11, ¶¶ 3, 4.1.[1]

3. Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*, requires federal agencies to engage in an inter-agency consultation process to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2); see also ESA § 7(b) and (c), 16 U.S.C. 1536(b) and (c). When the so-called "action agency" proposes an activity that is likely to have an effect upon a listed species, that agency must formally consult with the appropriate "wildlife agency," which, depending on

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[1] "E.R.—— " refers to the Excerpts of Record, which petitioners filed in the court of appeals.

the species, is either the Interior Department's Fish and Wildlife Service (FWS) or the Commerce Department's National Marine Fisheries Service (NMFS). The wildlife agency must provide the action agency with a "biological opinion," which consists of a written statement setting forth the wildlife agency's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species. See 50 C.F.R. 402.02, 402.14(h).

On November 5, 1990, the Secretary of Commerce adopted a final rule listing the Sacramento River winter-run chinook salmon, a unique population of chinook salmon that historically spawned in the upper Sacramento River and its headwaters, as a threatened species. 55 Fed. Reg. 46,515. Accordingly, the Bureau of Reclamation entered into a Section 7 consultation with NMFS. Pet. App. 4a. On February 12, 1993, NMFS issued a biological opinion finding that the Bureau's proposed long-term operations of the CVP would jeopardize the winter-run chinook salmon. *Ibid.* The opinion concluded, however, that the jeopardy could be avoided if the Bureau placed certain limitations on the CVP operations, including limitations on Tracy Pumping Plant diversions. See *id.* at 4a-5a.

On March 5, 1993, the Secretary of the Interior listed the delta smelt, a fish species indigenous to the Sacramento-San Joaquin Delta, as a threatened species. 58 Fed. Reg. 12,854. Accordingly, the Bureau and FWS entered into a Section 7 consultation. On May 26, 1993, the FWS issued a biological opinion addressing the Bureau's proposed CVP operations criteria and plan for the 1993 water year. That biological opinion found that the proposed 1993 CVP operations, which included, among other things, modifications in accordance with the NMFS bio-

logical opinion, were not likely to jeopardize the continued existence of the delta smelt. Pet. App. 5a.

4. In the meantime, Congress in 1992 had enacted the Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, §§ 3401-3412, 106 Stat. 4706-4731, which is intended to achieve, among other things, "a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." § 3402(f), 106 Stat. 4706. The CVPIA amends the CVP's authorizing statute to identify species mitigation, protection, and restoration as project purposes equal in priority to the purposes of providing water for irrigation and domestic uses. § 3406(a), 106 Stat. 4714. In addition, the CVPIA directs the Secretary to:

> dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act.

§ 3406(b)(2), 106 Stat. 4715-4716. The 800,000 acre-foot allocation is subject to a reduction of up to 25 percent under certain circumstances. See CVPIA § 3406(b)(2)(C), 106 Stat. 4716.

5. The Bureau of Reclamation subsequently announced its initial allocations of CVP water for 1993, which provided that the Bureau would supply CVP agricultural contractors situated south of the Delta (including the Westlands Water District) with only 50 percent of their maximum contractual amounts. See Pet. App. 5a-6a. Petitioners filed a motion in the district court to enforce the 1986 judgment, claiming a right to purchase and use the full 900,000 acre-feet of water specified in the 1963 water service contract. See Pet. App. 6a. The government responded that the Bureau was allocating only 50 percent of the maximum contractual amounts in the 1993 water year to CVP agricultural contractors south of the Delta (including Westlands) because, among other things, the water that would have otherwise been supplied to contractors such as Westlands was needed to meet the Bureau's ESA and CVPIA obligations. See *id.* at 5a-6a, 27a-28a.

The district court ruled that Article 11 of the 1963 contract, which relieves the United States of any liability "from a shortage on account of errors in operation, drought, or any other causes," allowed the Bureau to deliver less than the full 900,000 acre feet to Westlands in the 1993 water year. See Pet. App. 23a-37a. The court concluded that to the degree that petitioners were asserting that the Bureau had unreasonably determined that the 1993 allocations were necessitated by the ESA and the CVPIA, those contentions should be resolved in a separate action, rather than in a proceeding to enforce the 1986 judgment. *Id.* at 35a-36a. The court noted that the Westlands Water District and others had already filed a suit raising similar contentions. *Id.* at 36a. The court therefore denied petitioners' motion without

prejudice, indicating that it could be renewed depending upon the outcome of the pending challenge to the Bureau's allocation. *Id.* at 37a.[2]

6. The court of appeals affirmed. See Pet. App. 1a-22a. It concluded that the unavailability of water resulting from the application of the ESA and the CVPIA was a "water shortage" within the meaning of Article 11 of the 1963 contract. It accordingly ruled that the contract did not obligate the Bureau to furnish the full 900,000 acre-feet amount to the Westlands Water District in years in which the Bureau could not supply that amount without breaching its ESA and CVPIA obligations. *Id.* at 7a-17a. The court of appeals also held that the district court had not abused its discretion by abstaining from resolving challenges to the reasonableness of the Bureau's 1993 water year allocations. *Id.* at 18a-22a. The court observed that those issues should be resolved in the Westlands Water District's pending suit, which "will enable a comprehensive judicial resolution of the allocation problem which affects many parties other than [petitioners]." *Id.* at 22a.

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[2] The court reaffirmed its rulings in a subsequent order, Pet. App. 38a-56a, specifically reiterating that contentions concerning the purported unreasonableness of the Bureau's 1993 allocations should be made in the separate pending suit, *id.* at 55a-56a. The district court has allowed petitioners and other entities to intervene in that suit, see *Westlands Water Dist.* v. *United States Dep't of Interior*, 850 F. Supp. 1388, 1394 n.2 (E.D. Cal. 1994). The court also entered a preliminary injunction against the Bureau, but the court of appeals vacated that injunction. See *Westlands Water Dist.* v. *Natural Resources Defense Council, Inc.*, 43 F.3d 457 (9th Cir. 1994).

ARGUMENT

1. Petitioners assert (Pet. 16-19) that the district court's decision to abstain on the issues concerning whether the Bureau's 1993 allocations were arbitrary and capricious deprived them of their due process rights to be heard at a meaningful time and in a meaningful manner. Petitioners, however, failed to raise that constitutional argument in the court of appeals. Hence, that argument may not properly be raised here. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981).

In any event, petitioners' due process contention is without merit. Petitioners assert that the district court's abstention decision was unconstitutional because it "effectively ordained that the adjudication of the existence or nonexistence of any statutory mandate would occur, if at all, after the water available for use during the 1993-1994 irrigation season could no longer be delivered." Pet. 19. But there is no reason to believe that the district court could have resolved the allocation issues more promptly in this case if it had not abstained. At the time that he ruled on petitioners' motion to enforce the judgment, the district judge already had the same issues pending before him in the Westlands Water District's suit, and he abstained because he concluded that it would be more efficient to litigate the issues in that suit, which involved numerous additional interested parties.[3] As the district judge explained,

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[3] Numerous other entities besides Westlands and the petitioners are participating as plaintiffs in that action. In addition, FWS and NMFS have been named as defendants in that suit. See *Westlands Water Dist.*, 850 F. Supp. at 1394-1398.

> Any challenges to the Bureau's method of compliance with ESA and CVPIA will undoubtedly involve extremely complex and time-consuming proceedings. Judicial economy is not served by proceeding in separate cases brought by parties with seemingly identical interests.

Pet. App. 56a. Hence, the judge, who was familiar with the pending proceedings, elected to manage his docket in the manner that he concluded would provide the most expeditious resolution of the pending claims. That decision is consistent with principles of due process. Petitioner advances no reasons for believing that the court could have adequately resolved the allocation issues with greater dispatch in this proceeding rather than in the action brought by the Westlands Water District. Under those circumstances, petitioners are not entitled to relief. Cf. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 716-722 (1990) (holding that a court's failure to provide a detention hearing within a statutory time limit does not disable it from subsequently conducting a "prompt detention hearing").[4]

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[4] Petitioners state that "[t]he District Court and the litigants had spent considerable time and effort and, indeed, tried the statutory mandate questions before the second suit was filed." Pet. 29. Contrary to petitioners' assertion, the district court did not hold a trial. Rather, it heard argument on petitioners' motion to enforce the 1986 judgment. The issues regarding whether the Bureau had acted unreasonably in arriving at its 1993 allocations had been initially raised through petitioners' response to the government's opposition to petitioners' motion for enforcement of that judgment. Because the issues were initially raised in petitioners' response, filed just ten days before the scheduled hearing on petitioners' motion, the government did not have an opportunity to address them. If the

2. As petitioners acknowledge (Pet. 17), the issue of whether a federal district court may abstain from resolving matters that are pending in another case in the federal courts is a matter committed to the sound discretion of the district court judge. The district courts have broad powers over the management of cases in the interest of judicial economy and sound administration. As this Court stated in *Kerotest Mfg. Co.* v. *C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952):

> Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems. The factors relevant to wise administration here are equitable in nature. Necessarily, an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts.

Id. at 183-184. The court of appeals expressly applied the *Kerotest* standard to the situation presented by this case. See Pet. App. 19a.

Petitioners suggest (Pet. 28-29) that the court of appeals' decision is in conflict with the approach taken by the Second Circuit, which petitioner characterizes as following a "general rule * * * that the case first in time proceeds." Pet 28. Petitioners acknowledge, however, that the Second Circuit has also stated that its general "first in time" rule is subject to exception where circumstances, such as the "balance of convenience," warrant. *Ibid.* See

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district court had not abstained, it would have had to afford the government an opportunity to brief those issues, after which the court would have had to conduct a review based upon the administrative record.

Adam v. *Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991). In this case, the court of appeals concluded that the district court acted properly in determining that the considerations of judicial economy and other relevant circumstances favored abstention. Hence, the court of appeals' decision presents no conflict with the Second Circuit's abstention practice.

3. The court of appeals' decision not only creates no conflict, but it is also correct. The district court did not abuse its discretion by directing that the issues concerning whether the Bureau properly applied the ESA and the CVPIA should be initially resolved in the Westlands Water District's pending suit. CVP water allocations affect numerous CVP water users in addition to the petitioners in this case. They also implicate the judgment of the Bureau, the FWS, and NMFS on highly technical matters. As the courts below recognized, litigation concerning those allocations should be resolved in a comprehensive proceeding that includes the many entities that have an interest in the matter. Piecemeal adjudication of those claims would result in needless duplication of judicial effort and potentially conflicting rulings or relief. The district court acted properly in consolidating the claims in one proceeding.

Petitioners assert (Pet. 19-26) that the district court should have abstained on the "statutory" issues only if it also abstained on the other issues that petitioners presented in their motion for enforcement of the judgment. The court acted appropriately, however, in light of the issues before it. The court was entitled to reject petitioners' most extreme argument that the contract and prior judgment flatly prohibited any reduction in petitioners' allocation. Petitioners placed that question of law squarely before the court,

and if they had prevailed on that issue, there would have been no need for the court to decide how best to resolve petitioners' challenges to the 1993 allocations. As petitioners themselves acknowledge (Pet. 18-19), it was in their interest to obtain a prompt ruling on whether they had an entitlement to 900,000 acre-feet without regard to the terms of the ESA and the CVPIA. Petitioners cannot reasonably complain that the district court expeditiously resolved that question in this proceeding.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1995

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[5] The court explicitly preserved petitioners' right to seek additional relief depending on the outcome of the Westlands Water District suit. The court ruled that the 1993 allocations would not offend the water service contract and the 1986 judgment, provided that those allocations were based upon otherwise proper applications of the ESA and the CVPIA, and it indicated that petitioners could renew their motion if they established in the Westlands proceedings that the agency had acted improperly in setting those allocations. Pet. App. 37a; see also *id.* at 22a.

(3)

No. 95-422

Supreme Court, U.S.
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Supreme Court of the United States
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EDWIN R. O'NEILL, FRANCIS A. ORFF,
Y. STEPHEN PILIBOS,
Petitioners,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE GOVERNMENT'S FAILURE TO DEFEND THE IMPROPER DECISION OF THE DISTRICT COURT ON THE CONSTITUTIONAL ISSUES SHOULD BE TREATED AS A CONFESSION OF ERROR, AND THE COURT OF APPEALS OPINION SHOULD BE VACATED	2
A. The Government Effectively Concedes By Its Silence That The District Court's Opinion Was Erroneous And Merits Review	2
B. The Government's Concession By Silence Warrants Summary Disposition In Favor Of Petitioners	4
II. NEW POINTS RAISED IN THE OPPOSITION BRIEF RELATING TO THE COURT'S ABSTENTION ON THE STATUTORY ELEMENTS OF THE DEFENSE ARE WITHOUT MERIT	5
CONCLUSION	8

TABLE OF AUTHORITIES

Cases Page

Board of Regents v. Roth, 408 U.S. 564 (1972) 6
Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41 (1986) 2
Burger v. Zant, 467 U.S. 1212 (1983) 5
Califano v. Yamasaki, 442 U.S. 682 (1979) 3
Casey v. U.S. 343 U.S. 808 (1952) 4
Cates v. Haderlein, 342 U.S. 804 (1951) 5
Delta Airlines, Inc. v. August, 450 U.S. 346 (1981) 6
Edward J. DeBartolo Corp. v. NLRB, 463 U.S. 147 (1983) 3
Gardebring v. Jenkins, 485 U.S. 415 (1988) 4
Iron Arrow Honor Society v. Heckler, 464 U.S. 67 (1983) 5
Missouri v. Jenkins, 495 U.S. 33 (1990) 6
Ohio v. Roberts, 448 U.S. 56 (1980) 3
Powell v. Texas, 492 U.S. 680 (1989) 3
Sacher v. U.S., 343 U.S. 1 (1951) 6
Schiro v. Farley, —— U.S. ——, 114 S. Ct. 783 (1994) 4
Taylor v. Illinois, 484 U.S. 400 (1988) 6
U.S. v. Mendenhall, 446 U.S. 544 (1980) 6
U.S. v. Montalvo-Murillo, 495 U.S. 711 (1990) 7
Youakim v. Miller, 425 U.S. 231 (1976) 6

Miscellaneous

R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993) 4, 5, 6

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Petitioners presented as a main reason for granting certiorari that the District Court, as affirmed by the Court of Appeals, rendered improper advisory opinions on unripe elements of the government's defense, in particular, the issue of Congressional power under the due process clause to deprive farmers of perfected water rights against the Bureau of Reclamation. Pet. at 19-22. The government's brief in opposition offers no defense of the District

Court's action; indeed, it entirely fails to address petitioners' argument. The Court should treat this deafening silence as a confession of error by the government. Accordingly, it should summarily dispose of this case by granting certiorari, holding that the District Court rendered a premature and unnecessary decision, vacating the opinion of the Court of Appeals, and remanding the case to that court for further proceedings not inconsistent with this Court's judgment. At the very least, this Court should ask the government to deal with petitioners' argument.

This reply brief also addresses new points raised by the government's brief in opposition relating to the abstention by the District Court, also affirmed by the Court of Appeals, on the statutory aspects of the government's defense.

I. THE GOVERNMENT'S FAILURE TO DEFEND THE IMPROPER DECISION OF THE DISTRICT COURT ON THE CONSTITUTIONAL ISSUES SHOULD BE TREATED AS A CONFESSION OF ERROR, AND THE COURT OF APPEALS OPINION SHOULD BE VACATED.

A. The Government Effectively Concedes By Its Silence That The District Court's Opinion Was Erroneous And Merits Review.

The District Court decided, assuming *arguendo* that the government was obligated to supply, without excuse, the water in question, that the government's involuntary reallocations of the water were constitutional under the reserved sovereign power of Congress, citing *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 53 (1986). App. B at 46a-48a. The Court of Appeals affirmed, citing the same case, and stated as follows: "Even if the water service contract did obligate the government to supply, without exception, 900,000 acre-feet of water, the district court correctly held that Area I would still not be entitled to prevail as the contract

is not immune from subsequently enacted statutes." App. A at 16a-17a. About this most far-reaching aspect of the decision below, the government's brief says nothing. But its silence cannot hide the fact that the court below has ruled that Congress, at its will, can constitutionally direct the Bureau to deprive participants in the reclamation program of valuable water rights perfected by many years of beneficial use.[1] This ruling was purely advisory since the issue of the government's legislative power to relieve itself of its own water sale obligations would only have been ripe for adjudication if the District Court had simultaneously decided, rather than abstained from deciding, that the Bureau was justified by statutory mandates.

The government's brief declines to oppose a key reason stated in the petition for granting the writ—that the decision conflicts with this Court's rules on ripeness and advisory opinions. Pet. at 19-22. Petitioners relied on, among other authorities, *Califano v. Yamasaki*, 442 U.S. 682, 692 (1979) ("A court presented with both statutory and constitutional grounds to support the relief requested usually should pass on the statutory claim before considering the constitutional question. . . .") and *Edward J. DeBartolo Corp. v. NLRB*, 463 U.S. 147, 158 (1983) ("Until the statutory question is decided, review of the constitutional issue is premature."). The government's brief does not refer to either the ripeness or the advisory opinion doctrine, does not discuss *Califano*, *DeBartolo*, or any of the other cases petitioners cited, and does not attempt to deal in any fashion with this central reason for granting the writ.

The government also ignores a second and related reason for granting the writ. Petitioners showed that the

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[1] The wording of the District Court opinion (which was given preclusive effect in the subsequent related suit) and of the Court of Appeals opinion indicates that the constitutional ruling is an alternative holding. See *Powell v. Texas*, 492 U.S. 680, 682 (1989); *Ohio v. Roberts*, 448 U.S. 56, 70 n.10 (1980).

elements of the government's defense which the court decided, were necessarily "intertwined" with the undetermined statutory predicates of that same defense. No constitutional judgment could properly be made without an interpretation of the relevant statutes. Pet. at 22-26.

B. The Government's Concession By Silence Warrants Summary Disposition In Favor Of Petitioners.

Rule 15.2 of this Court provides, in relevant part, as follows:

> ". . . [T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues would properly be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition."

This rule means that the brief in opposition is the time and place to identify any alleged misstatement in the petition and requires that the opposition brief should answer the arguments contained in the petition. R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice* (7th ed. 1993) § 6.37 at 373. The failure to make an argument in the opposition brief is significant, and the Court may treat the failure as a waiver. *Schiro v. Farley*, —— U.S. ——, 114 S. Ct. 783, 788-89 (1994); *Gardebring v. Jenkins*, 485 U.S. 415, 425 n.12 (1988). The fact that the Solicitor General does not oppose the granting of a petition for certiorari is entitled to respect. *Casey v. U.S.*, 343 U.S. 808, 811 n.4 (1952). And confession of error by a litigant is an important factor for the Court to take into account. *Id.* at 811. The Solicitor General's decision not to defend the propriety of deciding the property deprivation issues is significant and should be deemed a concession that the question presented by the petitioners merits certiorari and that the decision below was in error.

Rule 16.1 of this the Court provides for summary dispositions of certiorari petitions on the merits. When a lower court clearly lacks power to render a decision, the Court will summarily grant the writ, vacate the judgment, and remand to the Court of Appeals for entry of an appropriate order. *E.g., Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 73 (1983). Similarly, the Court will so act where the opinion below is clearly erroneous. *E.g., Burger v. Zant*, 467 U.S. 1212 (1983). In particular, summary dispositions may be made in response to a confession of error. *Cates v. Haderlein*, 342 U.S. 804 (1951); Stern, Gressman, et al., *Supreme Court Practice* § 5.12 at 248. Given the *de facto* confession of error by the Solicitor General here, the proper procedure would be to grant certiorari, vacate the judgment below, and remand the case to the Court of Appeals for further consideration in light of the failure of the Solicitor General to defend the improper adjudication, affirmed below, of some, but not all, elements of the defense.

Alternatively, the Court should at least request the Solicitor General to respond in a supplemental brief to the reasons set forth in the petition which were not addressed in the opposition brief. *Id.* § 6.37 at 375 (". . . [T]he Court may request a repsonse to the petition . . . and will defer action on the case until the views and arguments of the respondent have been made known."). Should the Court so request, petitioners respectfully request that they be given the right to reply to any new points raised in such supplemental brief.

II. NEW POINTS RAISED IN THE OPPOSITION BRIEF RELATING TO THE COURT'S ABSTENTION ON THE STATUTORY ELEMENTS OF THE DEFENSE ARE WITHOUT MERIT.

One reason for granting certiorari advanced in the petition was that the abstention on the statutory elements of the defense, in addition to amounting to an abuse of discretion, also amounted to a deprivation of property

without procedural due process. Pet. at 17-19. The government raises the new point that the procedural due process theory had not been argued in the Court of Appeals and, hence, "may not properly be raised here," citing *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981). B.R.O. at 9. In *Delta Airlines*, the Court decided the proper interpretation of one federal rule relating to court costs, but declined to reach a claim under another rule on court costs, as the question had not been raised in the Court of Appeals.

In the instant case, petitioners argued below that the court should not have abstained on the statutory elements of the defense. They employed an abuse of discretion theory, rather than a procedural due process theory. Several Justices of this Court, however, have noted that an abuse of discretion by a District Court is tantamount to a violation of procedural due process. *Missouri v. Jenkins*, 495 U.S. 33, 66 (1990) (Kennedy, J. concurring); *Board of Regents v. Roth*, 408 U.S. 564, 590 (1972) (Marshall, J., dissenting); *Sacher v. U.S.*, 343 U.S. 1, 31 (1951) (Frankfurter, J., dissenting). Under appropriate circumstances, this Court may review questions not pressed or passed upon in the courts below. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). Such review is appropriate where the claim, although not specifically articulated below, is necessary for a correct disposition of the other issues and the evidentiary record has been fully developed. *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988); *U.S. v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980). Where the facts are undisputed and the issues have been raised and decided below, the Court may consider supplemental theories of law bearing on the same issues. See Stern, Gressman, et al., *Supreme Court Practice* § 6.26 at 344 n.92 (citing decisions of this Court for the proposition that purely legal questions presented in a petition may be appropriate for decision even though not addresed below). Here, the procedural due process theory is an appropriate adjunct to petitioners' argument, pressed

and passed on below, that the District Court's abstention was an abuse of discretion.

Also, the government makes a new point, unsupported by any evidence in the record and not asserted below, that abstention on the statutory interpretation issues was not erroneous, because such interpretation could not have been rendered "promptly" or with "dispatch" in the District Court.[2] B.R.O. at 9, 10. This contention is not correct. The meaning and effect of the relevant statutes could readily have been decided, based on the briefs, declarations, and other evidence presented by the parties, at any time on or after the initial May 3, 1993 hearing date. The statutory issues which the court declined to reach were no more complex nor difficult than the constitutional and contractual issues it reached and decided. Indeed, federal courts adjudicate statutory issues of comparable scope in similar proceedings every day, often from the bench.

The government also asserts the new point that petitioners' rebuttal to the statutory elements of the government's defense was "initially raised" in their April 23, 1993 reply papers and, as a result, the government "did not have an opportunity to address them." B.R.O. at 10-11. This, too, is inaccurate. When petitioners filed their post-judgment enforcement motion on March 26, 1993, they focused on their *prima facie* claim to enforce water rights. They had at that time neither the duty, nor the ability, to anticipate the precise nature of any affirmative defense the government might later raise. In its April 13, 1993 opposition papers the government asserted in conclusory fashion an affirmative defense founded on the first two of what would later become three statutory predicates. In reply, petitioners were finally able to, and

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[2] The government cites *U.S. v. Montalvo-Murillo*, 495 U.S. 711, 716-22 (1990). B.R.O. at 10. That case is not factually apposite and, in fact, confirms that "a prompt hearing is necessary." *Id.* at 716.

did, present substantial factual evidence and legal argument demonstrating that these statutory elements of the government's defense had not been established. The initial oral argument on the government's defense took place on May 3, 1993 and the District Court published its first decision on June 18, 1993. At no time between April 23 and June 18 did the government complain that it had been denied an opportunity to present its defense, nor could it have so complained. In its July 23, 1993 opposition to petitioners' second motion, the government tardily asserted in conclusory fashion a statutory argument supposedly supporting the third involuntary reallocation. It offered at that time no further evidence, and little further argument, on the previously briefed statutory issues.

CONCLUSION

For these reasons, the Court should summarily dispose of this case by granting certiorari, holding that the District Court rendered a premature and unnecessary decision, vacating the opinion of the Court of Appeals, and remanding the case to that court for further proceedings not inconsistent with this Court's judgment. At the very least, this Court should ask the government to deal with petitioners' argument.

Respectfully submitted,

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